THE NEW PROCEDURE

— IN —

CRIMINAL AND DISCIPLINARY CAUSES

— OF —

ECCLESIASTICS

IN THE UNITED STATES.

Or a clear and full explanation of the Instruction "Cum Magnopere," issued by the S. Congr. de Prop. Fide, in 1884, *for the United States,*

— BY —

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Letter from Card. Simeoni.

S. CONGREGATIONE DI PROPAGANDA, SEGRETARIA.

N. 3163. Roma, li 7 Agosto 1887.

Rev. Signore .

Ho ricevuto il nuovo libro da Lei teste dato alla luce, intorno alla procedura legale delle cause criminali contro gli Ecclesiastici. Ringrazio sentitamente la S. V. del cortese pensiero d' avermene inviata una copia. Desiderava leggere il suo lavóro, ma fino ad ora le mie occupazioni me lo hanno impedito. Se avro quálche ritagliodi tempo disponibile, non manchero di esaminarlo. Intanto esprimo alla S. V. la fiducia chè questo suo scritto abbia a riuscire molto utile al clero degli Stati Uniti.

Prego poi il Signore chè la conceda ogni bene.

Di V. S.

Affmo.

Giovanni, Card. Simeoni, Prefetto.

Pro Segretario,

Zefirino Zitelli, Min.

Rev. D. Sebastiano B. Smith, D. D.,
Rettore della chiesa di S. Guisseppe,
Diocesi di Newark.

Rev. Sir:

I have received the new book recently published by you, relative to the legal procedure in criminal causes of ecclesiastics. I thank you very sincerely for your courtesy in sending me a copy. I wished to read your work, but, up to the present, my occupations have hindered me from so doing. If I have any spare moments, I shall not fail to examine it. Meanwhile I assure you that I trust that this, your book, will be very useful to the clergy of the United States.

I pray the Lord to grant you every blessing.

Yours, most affectionately,

John Card. Simeoni, Prefect.

For the Secretary.

Zephyrino Zitelli, Minutante

To Rev. S. B. Smith, D. D.,
Rector of St. Joseph's Church,
Diocese of Newark.

Letter from Card. Gibbons.

CARDINAL'S RESIDENCE, 408 N. CHARLES ST.

Baltimore, June 13, 1887.

REV. DEAR SIR:

I have to thank you for the copy of the *New Procedure*, which you were kind enough to send me.

The Imprimatur of his Grace of New York, the letter of Father Gabriels, as well as your merited reputation for learning and patient research, lead me to hope that your commentary will be read with profit and interest by the Bishops and Clergy of the country. A decision has recently emanated from the Propaganda which throws some light on one of the points treated in your work.

Faithfully yours in Christ,

J. CARD. GIBBONS,
Archbp. of Balt.

Rev. S. B. Smith, D. D.

Letter from Card. Mazella.

ROMA, July 5, 1887.

Rev. S. B. Smith, D. D.,
Paterson, N. J.

REV. AND DEAR SIR:

I thank you very cordially for the copy of the *New Procedure*, which you had the goodness to send me, and my thanks are due also to the kind words with which it was accompanied.

Your labor, I trust, will be productive of lasting good; it is undoubtedly of very much practical utility, and I hope that God may grant you many years of usefulness to continue the good work begun so favorably.

Thanking you once more for your kindness, I remain,

Your Servant in Christ,

C. CARD. MAZELLA.

TESTIMONIAL.

Letter of the Very Rev. Dr. Gabriels, President of the Provincial Seminary, Troy, N. Y.

St. Joseph's Provincial Seminary,

Troy, N. Y., March 4, 1887.

Dear Doctor :—I have carefully read your Treatise on the Instruction *Cum Magnopere*, which is now in force in most of our dioceses as the rule for criminal and disciplinary trials of Clerics, and after the few changes you told me you would make in the work will have been introduced, I feel safe in saying that your dissertation will be *a most useful, practical guide* for all persons connected with said trials. Your doctrine strikes me as *truly orthodox and sincerely loyal* to all the degrees of ecclesiastical authority, and it is at the same time proposed in the *methodical order*, and the *clear language* which are so desirable, but not always found, in books on Canon Law.

I remain

sincerely yours in J. C.

H. Gabriels.

Rev. S. B. Smith, D. D.

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PREFACE.

The Instruction *Cum Magnopere* of the S. C. de Prop. Fide supersedes the Instruction of the same Congregation, dated July 20, 1878, and forms the present law for the United States. Its main features were discussed at the conferences held in Rome, between the Cardinals of the Propaganda and our Archbishops, during the month of November, 1883. After these conferences, it was promulgated as a law of the Holy See, and sent to the *Third Plenary Council of Baltimore*, held in November 1884. It is now obligatory all over the country, excepting in a few dioceses, where by Papal dispensation, the Instruction of 1878 is allowed to remain in force, until *the curia* can be properly established.

The Instruction *Cum Magnopere* which we explain in this treatise, is almost an exact copy or transcript of the Instruction of the S. C. EE. et. RR. issued on June 11, 1880. These two documents differ only in a few points. These differences are explained in the present work. Hence it may be said that our judicial procedure is now the same as that which exists in Catholic countries where the Canon law obtains.

The present Instruction *Cum Magnopere* prescribes the manner in which our Prelates are bound to proceed when they are about to impose preventive or repressive remedies or punishments. Preventive measures are *extrajudicial* or *paternal* remedies, and therefore must be preceded by an extrajudicial investigation. Repressive remedies are punishments proper, and consequently must be preceded by a *judicial* inquiry. The object of the inquiry, judicial or extrajudicial is to obtain a *certainty* of the offence charged.

The Instruction which is before us, outlines the manner in which both these investigations—namely the extrajudicial, and the judicial, or trial proper—must be conducted. Yet, like most laws, the Instruction merely *outlines* the main features of the procedure, and presupposes a full and accurate knowledge of the Canon law bearing on the subject.

We have endeavored in these pages to fill up this outline. Hence we explain, in plain and simple terms, the various parts of the Instruction; the consecutive order in which the different stages of the trial follow upon each other; and the connection of each article or part with the whole Instruction. We have thus endeavored to make it easy for all Ecclesiastics to understand our "New Procedure," even though they have not studied Canon law.

PATERSON, N. J.
May 1, 1887.

PREFACE TO THE SECOND EDITION.

The first edition of this work, though published but a short time ago, has already become exhausted. In the present edition we have made a number of corrections, though mostly of a typographical character. We have also added, in the appendix, several important documents, such as the latest decisions of the S. C. de Prop. Fide, concerning the dismissal and transfer of our Rectors who are not irremovable, the manner in which appeals, also from this country, are heard at Rome, etc.

We refer with unfeigned pleasure to the gracious letters of commendation from their Eminences, Cardinal Simeoni, Prefect of the Propaganda, Cardinal Gibbons, and Cardinal Mazella. These letters will be found on the front pages of this volume.

PATERSON, N. J.,
March 20, 1888.

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PART I.

THE INSTRUCTIO, IN GENERAL.

CHAPTER I.

HEADING AND PREAMBLE OF THE INSTRUCTION *CUM MAGNOPERE.*

1. The title or heading of the *Instruction* points out the cases in which the trial prescribed by it must take place. The preamble explains the aim which the S. C. de Prop. Fide had in view in issuing the document. We shall, therefore, under the present chapter, discuss (*a*) the rules which serve as guides in explaining and understanding the *Instruction;* (*b*) the nature of the trial prescribed in it; (*c*) the cases to which it extends; (*d*) its aim and scope; (*e*) finally, we shall give a brief synopsis of the entire proceedings.

ART. I.

Rules for Explaining and Understanding the Instruction.

2. The celebrated canonist, Avanzini, in his explanation of the Const. *Apost. Sedis* of Pope Pius IX., says (p. 6) that all laws, even the wisest, have this peculiar feature, that when there is question of their application, they easily give rise to doubts and difficulties, according to the nature of the cases to which, and the circumstances in which, they are to be applied. Hence the necessity of explaining laws.

3. These explanations are made (*a*) either by the law-giver himself—*i.e.*, by the superior who made the law, or by his successor, or by his higher superior; (*b*) or by private persons, namely, learned men and authors, or also by a law-giver who is inferior to the one who made the law. The former kind of explanations is called *authentic;* the latter *doctrinal.*

4. *Force and effect of explanations.*—An authentic explanation *has the force of law;* it therefore creates law and has to be obeyed like the law itself, which it explains. Hence it is termed *interpretatio necessaria.* A doctrinal explanation, on the other hand, has indeed not the force of law, yet it creates a *probability* as to the meaning of the law.[1] Therefore it is called *interpretatio probabilis;* it need not be followed, save when it is endorsed by the common consent of approved authors, or unless it is based upon arguments which are better than those adduced against it.[2]

5. *Who has the right to give an authentic explanation of the law?* Only the superior who made the law, or his successor, or higher superior. From this it follows that as the *Instruction* is a law made by the Holy See, it can be authentically explained by the Holy See only, and not by any other ecclesiastical superior.

6. *Who has the right to explain laws doctrinally?* Any person, theologian or canonist whatever has a right to explain a law, provided, of course, he does so according to the rules laid down by canonists.[3] This right of private persons or authors to explain laws doctrinally is not only useful but necessary. For, on the one hand, laws are never so explicit and clear as to remove ambiguity and doubts; and, on the other, it is not always possible or even expedient to have these doubts solved by the law-giver himself.[4] The

[1] Leur., For. Eccl., l. i., t. 2, q. 152. [2] Ib. [3] Ib., q. 155.
[4] Ib., l. c.

Holy See itself, when applied to for an authentic explanation of a law, sometimes refuses to give it and refers the applicants to approved authors by the formula: *Consulat probatos auctores.* The explanation of private authors creates, as we have seen, a *probability* as to the meaning of the law; hence it may be prudently and safely followed, as long as it is not shown to be false or improbable.[1] Sometimes this private explanation creates not merely a *probability*, but also a *certainty* as to the meaning of the law. This is chiefly the case when it is supported by the *consensus communis DD.*

7. *Q.* What are the chief rules which private persons—such as teachers, authors, etc.—should follow when they explain laws, and therefore also the present *Instruction?*

A. These: *Rule I.—Verba clara non admittunt interpretationem.* In other words, when the words of the law are clear, they do not admit of any explanation or conjecture as to the will of the law-giver.[2] Hence it is not allowed, in explaining a law, to recede from the plain and obvious sense of its words, unless it is manifest, from other sources, that the law-giver wished to convey a different meaning.

8. *Rule II.—The explanation should agree with the intention or mind of the law-giver, rather than the naked words of the law.*[3] This rule is in accordance with the axiom: *Ratio legis, est anima legis.* That is, the mind or intention of the law-giver is to the law what the soul is to the body. For, as the soul governs the body, so the intention of the law-giver governs the words of the law. Now this intention is to be gathered (*a*) from the reason stated in the law itself; (*b*) or from the circumstances which gave rise to the law. However, as we have seen, it is not allowed to recede from the

[1] Avanz., l. c., p. 9.
[2] Leur., l. c., q. 158.
[3] Can. 24, q. 5; l., 16 ff. de Leg.; Reg. 88, de Reg. jur. in 6°.

plain sense of the wording of a law, unless it is beyond doubt that the law-giver wished to convey a different meaning. [1]

9. *Rule III.—The words of the law are to be taken in their natural signification, unless the subject-matter of the law plainly shows the contrary.* The justice of this rule is apparent from the fact that if it were allowed to recede from the *ordinary* and *natural* meaning of words, no law would be secure or free from cavils. [2]

10. *Rule IV.—Where the words of the law are general and make no exception, the interpreter should not make any exception.* [3] This is in accordance with the axiom: "Ubi lex non distinguit, neque nos distinguere debemus." [4] This rule is evidently sound. For where the law itself speaks in general terms, and does not except any person or case from its provisions, it does not behoove the interpreter to make any exception.

11. *Rule V.—Where, however, the law itself excepts a certain case from its provisions, it is, by that very fact, considered as explaining and confirming its provisions, in everything else, according to the axiom: exceptio firmat regulam.* And justly so. For it is plain that whoever makes a law, and expressly provides that it shall not apply to a certain case, by that very fact declares that it shall apply to all other cases, save the one excepted. [5]

Let us apply this rule to the *Instruction.* This law, in art. ix., expressly excepts from its provisions sentences *ex informata conscientia.* From this exception it follows that in all other cases, where a punishment is to be inflicted, the trial laid down in the *Instruction* must be made use of.

12. *Rule VI.*—The next rule is thus stated by canonists: *Ubi eadem est ratio, eadem est juris dispositio.* The meaning

[1] Reiff., l. i., t. 2, n. 386-390. [2] Reiff., l. c., n. 395. [3] Cap. 22, de Priv.
[4] L. de Pretio., ff. de Public. in act. [5] Reiff., l. c., n. 405.

of this rule is, that it is allowed, generally speaking, to extend a law from the case to which it applies to other cases which are similar to it, and have the same or a similar object. In other words, a law can be extended by a private interpreter to cases not expressly or directly included in the law, whenever it is found that the object or motive which the law-giver had in view applies to these cases. Thus the Roman law, as adopted by the Church, says: "Semper quasi hoc legibus inesse credi oportet, ut ad eas quoque personas et ad eas res pertineant, quæ quandoque *similes erunt*." The reason is thus given by the sacred canons: *Cum de similibus idem est judicium.* This is called the *argumentum a simili* or *a pari.*

13. Nor can it be objected against this rule, that by giving such an explanation, a private author or person would create a law, that is, make a new law. Reiffenstuel l. I., t. 2, n. 412, and Leurenius, l. c., q. 159, n. 5, in common with canonists in general, answer that the objection does not hold. For, say they, it is, as we have already seen, the intention of the law-giver that his law should extend to all similar cases. In fact, a law-giver cannot foresee or expressly comprise every case in his law; hence, he is always presumed as wishing that his law should extend to all other cases, to which the motives, purpose, and intention apply, that induced him to make the law.[1]

14. *Rule VII.—In all causes, equity should rather be attended to than strict law.*[2] Thus the Roman law, as adopted by the Church, says: "In omnibus quidem, maxime tamen in jure, æquitas spectanda est."[3] By equity is here meant justice tempered with mercy, in accordance with the dictates of natural reason. There are two kinds of equity: written and unwritten. Written equity is that which is indicated in and, therefore, inferrible from the law itself. Unwritten

[1] Leur., l. c., q. 159, n. 5. [2] Reiff., l. c., n. 415. [3] L. 1 ff. de Reg. jur.

equity is that which is based upon the general feelings of mankind. Now, by the equity of which our present rule speaks, is understood primarily written equity. We say *primarily;* for, secondarily—*i.e.*, where there is no written equity, unwritten equity is also meant.[1]

15. *Rule VIII.—Laws which derogate from the "jus commune" of the Church must be strictly construed;* and that for two reasons: first, because, being a derogation from the general law, they are looked upon by the law as odious; second, because they are regarded as privileges and dispensations.[2]

16. *Rule IX.*—When there is question of a law which corrects or amends a former law, the following rule obtains: *The former law is changed neither more nor less than is expressly stated in the new law.* How this rule applies to the Instruction *Cum Magnopere* as corrective of the Instruction *Quamvis* of 1878, we shall see further on.

Art. II.

Nature of the Trial Outlined in the Instruction.

17. A trial, speaking in general, is the legitimate hearing, discussion and decision, in the presence of a judge, of a matter which is controverted between two contending parties.[3] Trials, thus defined, are divided into *secular* and *ecclesiastical*, according as they take place before a secular or an ecclesiastical judge. (Our *Elements*, Vol. II., n. 696.)

18. Ecclesiastical trials are subdivided as follows: 1. By reason of their subject matter, into *civil* and *criminal.* Criminal trials are those where offences are punished. Civil trials are those where there is question—*v.g.*, of the validity of a marriage, the jurisdiction of a prelate, and the like. 2. By reason of their formalities, into ordinary or formal and

[1] Reiff., l. c., n. 416, 417. [2] Leur., l. c., q. 161.
[3] Ferraris, V. Judicium, n. 1.

extraordinary. For the other divisions, see our *Elements*, Vol. II., n. 699 sq.

19. The trial laid down and prescribed by the *Instruction* is a canonical trial, which is (*a*) criminal (*processus canonicus criminalis*), (*b*) and summary, as we shall show further on.

Art. III.

Aim or Scope of the "Instruction."

20. We have seen that the *intention* or *aim* of the law-giver is the soul of the law. Hence, a law should be explained in accordance with the purpose of the law-giver, rather than the naked words of the law. What, then, is the intention or scope which the S. C. de Prop. Fide had in view, when it issued the Instruction? The preamble of the Instruction gives the answer. Here are the words: "Cum magnopere hujus S. Consilii intersit in judiciis ecclesiasticis eam methodum servari, quæ et temporum circumstantiis opportune respondeat, et regulari justitiæ administrationi, necnon Prælatorum auctoritati tuendæ, querelisque reorum præcavendis par omnino sit, placuit iterum ad examen revocari . . . ."

21. Here, then, the S. Congregation clearly explains the aims it had in view in issuing the Instruction. These aims are: To establish such a mode of hearing and deciding criminal and disciplinary causes of ecclesiastics, (*a*) as would be adapted to the wants of our time; (*b*) be wholly adequate to the regular administration of justice; (*c*) protect the authority of prelates; (*d*) and prevent complaints on the part of the accused.

22. Let us briefly explain each of these ends of the Sacred Congregation. The *first* is to establish *eam methodum quæ et temporum circumstantiis opportune respondeat* — *i.e.*, such a mode of proceeding as is adapted to the times. According to the general law of the Church, criminal and disciplinary

causes must always be tried by a formal or ordinary canonical trial; they can never be heard and decided by a summary canonical trial.[1] Now it would be scarcely possible, at the present day, to observe in this country all the formalities of the *processus ordinarius* or formal canonical trial. Accordingly the Sacred Congregation, as it expressly states in article x., prescribes that mode of procedure which is called the canonical summary trial—*processus summarius*. Consequently the Sacred Congregation grants, for this country, an unconditional dispensation from the obligation of observing the ordinary canonical trial, in the hearing of criminal causes, and allows absolutely and unconditionally of the summary process. This is a larger concession than that granted by the Holy See to Bishops of European countries, in the Instruction of the S. C. EE. et RR. issued June 11, 1880. For this latter Instruction dispenses bishops of European countries from the obligation of observing the formal canonical process and allows of the summary trial in criminal causes of ecclesiastics, only on condition that it is impossible or inexpedient to carry out the ordinary trial.

23. The *second* aim of the Sacred Congregation is to establish "eam methodum, quæ *regulari justitiæ administrationi par omnino sit*." In other words, the Holy See, while allowing of the summary trial, wished, nevertheless, to provide such a mode of proceeding as would be wholly and in every respect—*par omnino*—adequate to the regular administration of justice. Hence, also, the S. Congregation, while dispensing with certain accidental formalities of solemn canonical trials, nevertheless retains and prescribes, in the Instruction (art. x), *each* and *every substantial formality of justice*. (See our *Elements*, Vol. II., n. 692, 693, 694, 698, 704.)

[1] Our Elements, vol. ii., n. 1275, sq.

24. By the phrase *regularis justitiæ administratio* is here meant the legitimate administration of *vindicative justice*, that is, of that justice which metes out just and merited punishment to the offender. Consequently, wherever a *punishment* is to be inflicted—*v.g.*, the dismissal of a rector who is not irremovable, in punishment of crime—the trial laid down in the *Instruction* must be given.

25. The *third* end of the S. Congregation is to provide "eam methodum quæ *Prælatorum auctoritati tuendæ par omnino sit.*" The reason upon which this aim is based is apparent. For, law is the securest and strongest support of authority. Hence, when the authority of superiors is exercised in accordance with law, it is respected by all, and is thus strengthened. But when it is exercised not in accordance with the rules of law, and consequently when it is exercised arbitrarily, it makes itself odious, is hated by subjects, and is thus weakened.

26. The *fourth* intention of the S. Congregation is to establish "eam methodum quæ *querelis reorum præcavendis par omnino sit.*" Nothing is better calculated to stop complaints, on the part of those who are tried and condemned, than the observance of due forms of law. When the accused receives a fair, full and impartial trial; when the fullest liberty is given him to defend himself; when every possible means is afforded him to show his innocence; and when, notwithstanding all this, he is found guilty, then his guilt becomes established publicly, that is, in such a manner that it will convince not merely the judge, but everybody else. Consequently, the accused cannot complain if he is punished after such a trial. And if he, nevertheless, does complain, the justice or injustice of his sentence is a matter of public record and can be ascertained by any one. Besides, people will all know that he has had a fair trial and that consequently he has no just cause of complaint. In accordance with its aim, the Sacred Congregation has

given the accused, in the trial laid down by it, the fullest liberty to defend himself.

27. We have said above, that the aim of the law-giver may also be gathered from the circumstances under which he issues the law. Now the circumstances under which the Sacred Congregation issued the Instruction are well known. The mode of procedure laid down in the Instruction *Quamvis*, of July 20, 1878, and in the subsequent answer *ad Dubia*, had been found inadequate in a number of respects. Thus it was not a canonical trial. The appeal permitted by it was not suspensive. Hence it did not work satisfactorily. It was to remedy these inconveniences, and thus to provide a trial or mode of proceeding which would be wholly adequate to attain the above ends, that the Sacred Congregation re-examined the Instruction of 1878, and also the subsequent answer *ad Dubia;* and that, having maturely weighed all things, it decreed that the present *Instruction* should be observed in future, and that consequently the Instruction of July 20, 1878, together with the subsequent explanations *ad Dubia*, were abrogated, except in so far as they were retained by the present Instruction.

28. Here the question arises: How far is the Instruction of 1878 and the subsequent response retained in the present *Instruction?* The answer will be given by us, when we come to discuss articles xii. and xlv. of the *Instruction.*

Art. IV.

Causes or Matters to which the Instruction Extends.

29. What are the causes to which the *Instruction* extends? In other words, what are the cases in which the mode of proceeding outlined in the Instruction must be observed? This question is answered by the very title or heading of the *Instruction.* This title reads: "Instructio Sacræ Con-

gregationis de Propaganda Fide, de modo servando in cognoscendis et definiendis *causis criminalibus et disciplinaribus* clericorum, in Fœderatis Statibus Americæ Septentrionalis." The translation of this heading is: The present Instruction of the S. C. de Prop. Fide prescribes the manner of proceeding which must be observed by the Bishops of the United States of America, when there is question of hearing and deciding *criminal and disciplinary causes* of ecclesiastics. Consequently all criminal and disciplinary causes of ecclesiastics must be disposed of in the manner outlined by the *Instruction;* otherwise the action of the superior is *ipso jure* null and void. Nay, his action becomes invalid, not only when he omits the entire proceedings, but also when he sets aside any of the prescribed formalities of the proceedings.[1]

30. What, then, is meant by *causæ criminales* and *causæ disciplinares?* For the answer we refer the reader to the *third* volume of our *Elements of Ecclesiastical Law*, where we fully explain these phrases. Suffice it here to say that they mean all cases where (*a*) an ecclesiastical punishment (*pœna*), (*b*) or a censure (*censura*), (*c*) or a grave disciplinary correction (*gravis disciplinaris coercitio*), is to be inflicted. This is also expressly stated by the *Third Plenary Council of Baltimore*, (n. 310) as follows: "Animadvertant autem Episcopi, hoc uno casu excepto (scilicet remedium extrajudiciale *ex informata conscientia*), nullam pœnam repressivam adhiberi debere, nisi prævio processu judiciali, ita ut etiam in causis, quæ dicuntur *ex notorio*, omnino consultius sit processum summarium de delicti notorietate instruere, antequam pœna infligatur."

31. Against this argument, taken from the title of the *Instruction*, it may be objected that the title of a law, decree, or Instruction, does not form part of the law itself, and

[1] Instr., art. xliii.

therefore has little or no weight. This objection does not hold. For all canonists teach that when the title or heading of a law is *authentic*, that is, when it proceeds from the law-giver himself, it has these four effects: *First*, it has *the full force of law*, no less than the text itself or body of the law to which it is prefixed, whenever it makes up a sentence which has complete sense by itself, like the following headings: "Ut beneficium ecclesiasticum sine diminutione conferatur:" or, "ne sede vacante aliquid innovetur." We say, *which has complete sense;* for when a title has but an imperfect meaning, is composed merely of a word or two, and reads, for instance, thus: "De Summa Trinitate," it has no force of law, though, in case it is authentic, it has, like headings with full sense, a declarative force.

32. *Second*, it has a *declarative* force, so that where the law to which it is prefixed is obscure or ambiguous, it can and should be explained by the heading. From this rule canonists infer that when a law or instruction seems to admit of two meanings, or appears in some of its provisions to contradict its heading, that meaning is to be preferred which is more in harmony with the title or heading.[1]

33. *Third*, a heading or title which has complete sense, and is *more comprehensive* than the enactment to which it is prefixed, generally extends and enlarges the meaning of the law.[2]

34. Let us now apply these rules to the title of the *Instruction*. This title was undoubtedly prefixed by authority of the Holy See, and is therefore *authentic:* it contains, moreover, as is apparent, *full sense*. Consequently, it has all the effects and force above described. Accordingly it is, beyond doubt, that the Instruction extends to the causes indicated above.

35. Finally, if there could be any doubt on the matter, it

[1] Schmalzg., l. c., n. 301. [2] Ib., n. 300.

has been removed by the Holy See itself. For the S. C. de Prop. Fide, in its answer to the questions (*ad Dubia*) addressed to it by bishops of the United States, concerning the Instruction of July 20, 1878, has expressly declared that the latter applies to all cases where an ecclesiastical punishment, or censure, or a grave disciplinary correction is to be inflicted. Here are the words of the Sacred Congregation: "Instructio diei 20 July 1878 lata est de casibus, in quibus ecclesiastica pœna seu censura sit infligenda, aut gravi disciplinari coercitioni sit locus." Now, the title of the present Instruction, *Cum Magnopere*, is precisely the same as the title of the Instruction of 1878. Hence the response of the Holy See *ad Dubia* also applies fully to the present Instruction.

36. All this is confirmed by article ix. of the Instruction. This article expressly excepts sentences *ex informata conscientia* from the provisions of the Instruction. Now, as we have seen, *exceptio firmat regulam.* Hence, by the very fact of making this exception, the *Instruction* decrees that in all other cases where any repressive punishment is to be inflicted, the trial outlined in the *Instruction* must precede the punishment. Lastly, the *intention* of the Sacred Congregation corroborates our teaching. One of its aims, as already shown, was to provide an adequate mode of procedure for the administration of justice—*i.e.*, for the infliction of punishments.

37. The Instruction applies only to *ecclesiastics*, not to *laics.* In fact, at the present day, the Church, also with us, finds it almost impossible to proceed judicially against laics, even when they commit offences strictly ecclesiastical. The *Instruction*, besides laying down the procedure for inflicting repressive punishments, also gives the manner of imposing preventive remedies, as we shall see.

Art. V.

Synopsis of the Instruction.

38. Before entering upon the details of the *Instruction* we shall here give a brief outline of it. The *Instruction* gives, as we have seen, the procedure which must be observed prior to the infliction of punishments. Now, ecclesiastical punishments are of two kinds: preventive and repressive.[1] The chief preventive remedies are: Spiritual exercises, admonitions and the precept.[2] Before any of these can be imposed, an extrajudicial investigation must be made and put in writing.[3] As to the manner of giving the canonical warnings, the Instruction allows them to be given either in a paternal or legal form.[4] When the warnings prove useless, the formal injunction (*præceptum*) is given, in the manner stated by the *Instruction*.[5] When even the precept is disregarded, nothing remains for the Ordinary but to proceed to the judicial process or trial proper, for the purpose of juridically establishing the guilt of the accused and inflicting punishment.[6]

39. By repressive punishments, as we shall show fully in the *third* volume of our *Elements*, are meant chiefly dismissals from parish or mission, penal transfers, suspensions, etc. A canonical trial, or *processus judicialis*, must precede all repressive punishments, save in the one case of suspension *ex informata conscientia*.[7] This trial, which is summary, is begun by the judge *ex officio*.[8] The court conducting the trial is composed of the bishop, or auditor delegated by him, as judge; of the diocesan prosecutor, and a secretary. The first step of the trial is the formal charge of the diocesan prosecutor. This charge—called *libellus accusationis*—

[1] Instr., art. ii. [2] Ib., art. iv. [3] Ib., art. v. [4] Ib., art. vi.
[5] Ib., art. vii., viii. [6] Conc. Pl. Balt., iii., n. 309. [7] Instr., art. ix.
[8] Ib., art. x., xi.

should be clear and specific. The charges or statements contained in it should be based upon reliable and trustworthy data, or information obtained beforehand by the Bishop or prosecutor, even though in an extrajudicial manner. [1]

40. The second step is the preliminary trial, called *processus informativus*. When the prosecutor has handed in his charge, the Bishop, or auditor delegated by him, proceeds to institute the *processus informativus*, for the purpose of ascertaining whether there exists *probatio legalis* against the accused. [2] It takes place prior to the citation of the accused, as its object is to prevent the accused from being cited and thus disgraced, without sufficient legal proof of his guilt. It is conducted in a strictly judicial, though summary manner. Hence it takes place (*a*) at the instance of the prosecutor, (*b*) before the judge or auditor, (*c*) who is attended by a secretary. The witnesses are examined under oath, apart from each other.

41. When this preliminary trial is over, and it is found that there is a sufficient legal proof of the guilt of the accused, the latter is cited for trial; otherwise the case is dismissed. [3] If the accused, upon being cited, refuses contumaciously to appear, he is first declared contumacious, and then the trial proceeds in his absence. [4] But if he appears, he is first invited to make whatever statement he desires concerning the charges; or also to make his exceptions, etc. [5]

42. Next the *contestatio delicti* takes place; that is, the prosecutor presents the specifications or counts of the charge, and the accused admits or denies them. Then all the proofs collected in the *processus informativus* are communicated to the accused. This is called *legitimatio processus*. [6]

[1] Instr., art. xv. [2] Ib., art. xvi.–xxi. [3] Ib., art. xxi.–xxiii.
[4] Ib., art. xxiv. [5] Ib., art. xxv. [6] Ib., art. xxvi.

43. After this, the accused is allowed the fullest right of defending himself; that is, to produce witnesses, documents, etc., and also a full written defence.[1]

44. When the judge or auditor has admitted all the witnesses and other proofs produced by the accused, he closes the trial, and makes a synopsis of all the evidence submitted on both sides.

This entire proceeding, thus far outlined, is called *compilatio processus*. Where the *curia* is not yet established, this *compilatio processus* is made by the Commission of Investigation, acting under the presidency of the Bishop.[2]

45. After the close of the trial as just stated, the final defence or final summing up takes place, in the following manner: The advocate of the accused is given full access to all the evidence and records extant in the *curia* or chancery. He may copy these documents if he chooses.[3] Then these records are sent to the prosecutor, who, having examined them, sums up the case against the accused, in writing. His summing up is communicated to the advocate of the accused. The latter, having thus before him the entire case, prepares a careful and exhaustive summing up, in writing. Whereupon, all the papers, documents, etc., are given to the ordinary, who fixes a day for the sentence, notifying the accused of the day appointed.[4]

46. On the day fixed, the sentence is pronounced, and afterwards an authentic copy of it given the accused, who can appeal against it.[5] The appeal has a suspensive effect, except in the cases enumerated by Pope Benedict XIV. Const. *Ad Militantis*.[6]

47. The appeal must be made within ten days from the time the accused receives proper notice of it.[7] As soon as the appeal has been made, the judge *a quo* sends all the acts

[1] Instr., art. xxvii., xxviii. [2] Ib., art. xii. [3] Ib., art. xxx., xxxi.
[4] Ib., art. xxxiii. [5] Ib., art. xxxiv., xxxv. [6] Ib., art. xxxvi. [7] Ib., art. xxxvii.

of the case to the judge *ad quem*, who thereupon commands the appellant to appoint an advocate within thirty days.[1] Then the judge *ad quem—i.e.*, the metropolitan, proceeds to adjudicate the case, observing the same form of trial as outlined in the Instruction for the court of the first instance.[2]

48. If the appeal is made to the Holy See, either from the judge of the first instance, or from the judge of the second instance, the appellant must observe the regulations contained in the decree of the S. C. EE. et. RR. Dec. 18, 1835, and the latter's circular, dated Aug. 1, 1851.[3] That is, the appellant must, within the time fixed by the Sacred Congregation, appoint an advocate resident in the Roman curia to conduct his case, and take the other steps indicated by us below, under article xli.

[1] Instr., art. xxxviii., xxxix., xl. [2] Ib., art. xli. [3] Ib., art. xxxvi.

PART II.

THE INSTRUCTION, IN DETAIL.

49. The entire Instruction may be divided into four parts: the first—from article i. to article ix.—decrees the manner of imposing preventive remedies; the second—from article ix. to article xxxv.—prescribes the trial proper—*i.e.*, mode of inflicting the repressive remedies or punishments; the third—from article xxxv. to article xli.—lays down the mode of procedure in appeals; the fourth—from article xli. to article xlv.—regulates several other matters connected with the trial. Accordingly we shall divide this treatise into a number of chapters to correspond to this division.—

CHAPTER I.

PREVENTIVE REMEDIES—MANNER OF IMPOSING THEM.

50. The mode of procedure, given in this first part of the *Instruction*, is an *extrajudicial* one. Because the remedies which are imposed by this procedure are *paternal* corrections rather than *punishments* proper.

ART. I.

Right and Duty of the Ordinary to Inflict Canonical Remedies.

I. "Ordinarius pro suo pastorali munere tenetur disciplinam correptionemque clericorum ita diligenter curare, ut circa eorum mores assidue vigilet, ac remedia a canonibus statuta sive præcavendis, sive tollendis abusibus in clerum aliquando irrepentibus provide adhibeat."

51. This article inculcates two principles: one, that it is the bishop's right and duty to watch over the conduct of his clergy, and to prevent or punish crimes and abuses among them; the other that he can inflict only such punishments as are established by the sacred canons.[1] Both these principles are too well known to need any further explanation; we, therefore, pass to the next article.

Art. II.

The Various Kinds of Remedies or Punishments Established by the Sacred Canons.

II. "Haec vero remedia, alia praeventiva sunt, alia repressiva. Illa quidem ad præpedienda mala, scandalorum stimulos amovendos, voluntarias occasiones et causas ad delinquendum proximas vitandas ordinantur. Haec vero eum in finem constituta sunt, ut delinquentes ad bonam frugem revocentur, ac culparum consectaria de medio tollantur."

52. This article points out the two classes of remedies or punishments which are authorized by the sacred canons, for the prevention or punishment of offences among ecclesiastics. For the explanation of this article, we refer the reader to the *third* volume of our *Elements of Ecclesiastical Law*, which will be published at an early day, and treat *ex professo* of the ecclesiastical punishments, both preventive and repressive, mentioned in the present article of the *Instructio*.

Art. III.

Discretionary Power of the Ordinary in Inflicting Punishments.

III. "Conscientiae Ordinarii remittitur cujusque remedii applicatio, canonicis praescriptionibus servatis pro casuum ac circumstantiarum gravitate."

53. The law of the Church is: "Pœna non irrogatur, nisi quæ quaque lege, vel quo alio jure specialiter huic delicto

[1] Cap. 1, de Off. Ord.

imposita est." [1] In other words, no crime or offence can be punished, *unless it is designated by law as punishable*. Hence the *Instructio*, art. xxxiv., enacts that the bishop or vicar-general, when pronouncing sentence of condemnation, shall expressly state the *sanctio canonica*, that is, the law of the Church which authorizes the infliction of the punishment in the case.

54. Now, as we shall show more fully in the *third* volume of our *Elements of Ecclesiastical Law*, there are two ways in which ecclesiastical law designates a crime as punishable. *First*, the law *expressly* annexes a *specific penalty* to a certain unlawful act or omission. Thus the canon *si quis suadente diabolo*, 29, c. 17, q. 4, enacts that if any one maliciously maltreats an ecclesiastic, he shall incur excommunication. *Second*, the law states indeed that an act or omission is punishable and therefore attaches a general penal sanction to it, but does not express what specific penalty is annexed to it, *leaving the ecclesiastical judge free to inflict whatever punishment he may deem just.*

55. Where the law itself clearly states what punishment shall be incurred for a certain offence, the ecclesiastical judge should, as a rule, inflict this punishment and no other. We say, *as a rule;* for, where there are extenuating circumstances, the judge can and should mitigate the punishment. Where the law leaves the judge free to inflict whatever punishment seems fair and equitable, he must be guided in his action by the rules of equity, that is, he should inflict such punishments as will be regarded fair and just by all good and intelligent persons, considering the gravity of the offence and its extenuating or aggravating circumstances.

56. Thus it is evident that an offence—*i.e.*, a violation of a law, will be punishable in a greater or less degree, according as the law which is violated is of greater or less import-

[1] L. *Aliud.* 131, ff. de V. S. (50, 16); München, Can. Trial, vol. i., p. 97.

ance or gravity. Next, the same offence or the violation of the same law may deserve greater or less punishment, according to the circumstances under which it is committed. Thus an offence which is committed not merely once, but repeatedly, and after due admonition, with cool premeditation and full malice, is more punishable than the same offence committed—*v.g.*, in the heat of passion, on the impulse of the moment, or under the influence of fear, and consequently without full deliberation. All these aggravating or extenuating circumstances are laid down in the sacred canons.[1]

57. Again, sometimes there may be weighty reasons for not prosecuting a criminal or inflicting any punishment at all. The punishment might cause more harm than good: drive the delinquent to despair instead of causing him to amend; give scandal, by making an offence public which is still secret; or implicate a third party—*v.g.*, where an ecclesiastic has had illegitimate intercourse with a young lady, of good character and unmarried. For if the young lady should protest against the trial, on the ground that she would be defamed thereby and lose her chances of marriage, it would be wrong for the judge to proceed any farther in the case.[2] It is plain, therefore, that it is left to the *conscientious discretion of the Ordinary to determine whether or not it is best, in a given case, to proceed against the offender or to take no action at all.* Hence, also, as we shall see further on, the diocesan prosecutor cannot prefer official charges against a supposed delinquent, unless he is authorized by the bishop to do so.

58. From what has been said, it is apparent that the Ordinary is the judge as to the opportuneness of inflicting the canonical remedies, and also, generally speaking, as to the amount or degree of punishment. This is the meaning of the words: "*Conscientiæ ordinarii* remittitur cujusque

[1] München, l. c., vol. ii., p. 94. sq. [2] Droste, p. 110.

remedii applicatio, canonicis præscriptionibus servatis pro casuum ac circumstantiarum gravitate."

Art. IV.

What are the Preventive Remedies?

IV. "Praeventiva remedia sunt praecipue spiritualia exercitia, monitiones, praecepta."

59. The *Instructio* here enumerates the chief preventive remedies—namely, spiritual exercises, admonitions and precepts. It is to be noted that these are the *chief*, not the *only* preventive punishments. For a full explanation of each of these preventive remedies, see our *Elements of Ecclesiastical Law*, Vol. III., Part II., Chapter I.

Art. V.

When and How are the Preventive Remedies Imposed?

V. "Antequam vero ea adhibeantur, summaria factorum recognitio præcedat oportet: cujus notitiam Ordinarius servari curet ut, si opus sit, ad ulteriora procedere possit, et ut auctoritati ecclesiasticæ superioris gradus in casu legitimi recursus totius rei rationem reddat."

60. The *Instructio* now (art. v.–ix.) prescribes when and how the various preventive measures are to be applied. We therefore ask: *When* can these remedies be imposed? The *Instructio* itself gives the answer, in article ii., as follows: Illa (remedia præventiva) ad præpedienda mala scandalorum stimulos amovendos, voluntarias occasiones et causas ad delinquendum proximas vitandas ordinantur." In other words, these remedies can be imposed upon an ecclesiastic when he is guilty of actions which are the proximate voluntary occasions of sin, or which give scandal. For a fuller explanation, see our *Elements*, Vol. III., Part II., Chapter I.

61. The next question is: *How* are these remedies imposed? The *Instructio* answers: "Antequam vero ea adhi-

beantur, summaria factorum recognitio præcedat oportet." In other words, before applying any of these remedies, the Bishop is bound to institute a summary investigation into the facts of the case. This is the authentic explanation of the phrase *summaria factorum recognitio*, given by the Holy See itself. For, in the conferences held in Rome, in November, 1883, between the Propaganda and our Prelates, one of the latter asked: "Quid significent verba illa articuli v. *deve precedere una sommaria verificazione del' fatto?*" The Cardinals replied: "Significare Episcopum acquirere debere certam cognitionem facti seu criminis, de quo quis accusatur; sed non esse necessarium ut talis cognitio acquiratur modo judiciali, et sufficere documenta extrajudicialia." This answer also gives the aim or object of the investigation, namely, to obtain a *moral certainty* of the existence of the offence, or reprehensible acts calling for the preventive remedies, lest, otherwise, a person who is not guilty of such offence or acts should be unjustly visited with preventive punishments.

62. As to the *manner* in which this investigation is to be conducted, it is as follows: It should be made (*a*) in a *paternal*, not *judicial* way; (*b*) *informally—i.e.*, in a plain, simple manner, without judicial formalities; (*c*) *non citato nec constituto reo;* (*d*) with great prudence, so that it will not attract publicity; (*e*) a written record of the whole investigation shall be kept by the Ordinary, so that he may, in case the preventive remedies produce no effect, proceed even to repressive measures, or give an account of the whole matter to the higher ecclesiastical authority, in case the accused appeals to the latter against the preventive measures of his Ordinary.

63. We say, *so that he may, in case the preventive remedies produce no effect, proceed even to repressive ones.* For, as we shall show later on, this extrajudicial investigation, though not sufficient to authorize the Ordinary to cite the

accused to appear for trial, may, nevertheless, be sufficient to enable him to take the first step of the trial proper—namely, to order the diocesan prosecutor to draw up the formal charges.

64. When, upon the conclusion of the inquiry, the Ordinary finds it certain that the accused or suspected ecclesiastic is guilty of acts or omissions justifying the application of preventive remedies, he can forthwith proceed to impose spiritual exercises, or the canonical admonitions, and also, if the latter are fruitless, the injunction of article viii. We say, *when the Ordinary finds it certain;* for all canonists agree that these remedies are punishments and can, therefore, be imposed only when there is a certainty of guilt. As, however, the remedies in question are chiefly of a paternal character, rather than punishments proper, and do not transcend the limits of the Bishop's paternal authority, it is sufficient to establish the certainty of the guilt by extrajudicial proofs.

Art. VI.

How the Canonical Admonitions are Given.

VI. "Canonicae monitiones vel secreto fiunt (etiam per epistolam vel inter positam personam) ad modum paternæ correptionis, vel servata forma legali adhibentur, ita tamen ut illarum executio ex aliquo actu pateat."

65. Having stated the conditions that must *precede* the application of preventive measures, the Instruction next, in the article under discussion, proceeds to describe the requisites that must *accompany* the canonical admonitions, which constitute the most important preventive remedy, and the one most frequently resorted to. How, then, are the canonical admonitions to be given? The article under discussion answers that they are made either *in forma paterna* or *in forma legali.*

66. Here the question arises at once, whether, according

to this article, the Bishop is at liberty to give the canonical warnings in *either* of the above two ways, as he sees fit, or whether he is obliged to give the canonical admonitions *first* in a paternal, and then in a legal manner. There are several opinions. The *first* holds that he is free to select either mode; that either one is sufficient, and that consequently both are not required. The objection that may be urged against this opinion is, that it seems opposed to the clearest prescriptions of the sacred canons, which command most emphatically that the canonical warning shall be made only in a legal manner.

67. Those who hold the opinion in question answer this objection by saying that the *preceptum* of articles vii. and viii. constitutes the canonical warning in the strict sense of the term; and that the *canonicae monitiones* of article vi., even when made in a legal manner, are to be considered merely as fatherly admonitions, or if we may use the term, as semi-canonical or semi-official warnings, which, however, are made obligatory, prior to the imposing of the precept or the canonical warning proper. (See our *Elements of Ecclesiastical Law*, Vol., III., Part II.)

68. The *second* opinion interprets article vi. as speaking disjunctively of two kinds of admonitions—the paternal and the canonical proper, and as imposing the obligation of giving the paternal warning first, and the canonical afterwards. The latter must be made with all the formalities prescribed by the sacred canons.

69. We shall now briefly describe the manner in which the Ordinary should give the canonical warnings, whether paternal or legal, of which the present article speaks. When the admonition is given *paternally*, it should be made *in as informal a manner as possible*, so that the person warned may plainly see that it proceeds from the Bishop, acting, not as a judge, but wholly as a father, who in all kindness and paternal goodness goes after the stray sheep, in order

to reclaim it, in imitation of our divine Master.[1] Hence this paternal admonition should be given *secretly*, *charitably*, and *prudently*, as we explain in detail, in the *third* volume of our *Elements of Ecclesiastical Law*, to which we refer the reader for further particulars on this head.

70. When the canonical admonition is given in a *legal* or *formal* manner, the following formalities should be observed—namely (*a*) it must be repeated *three times*, except in case of urgent necessity, when one peremptory is sufficient; (*b*) it must be given in writing; (*c*) state precisely *what is to be done or avoided;* (*d*) lay down a *suitable and fixed time* for compliance with the precept; (*e*) mention the *specific punishment* which will be inflicted, in case the warning is disregarded; (*f*) it should be read or handed to the delinquent in *person;* (*g*) in the presence of *competent witnesses;* (*h*) be issued by authority of the judge. We explain each of these formalities in the third volume of our *Elements*.

71. Here we merely remark that whether the warning is made in a paternal or legal manner, care should always be taken, as the *Instructio* enjoins, to give it in such a manner as to obtain proof of its having been really given.

Art. VII.

When the Formal Precept is Imposed: its Tenor.

VII. "Quod si monitiones in irritum cedant, Ordinarius jubet, per Curiam delinquenti analogum praeceptum intimari ita, ut in hoc explicetur, quid ipse vel facere vel vitare debeat, addita respectivae poenae ecclesiasticae comminatione, quam si praeceptum transgrediatur, incurret."

72. The *Instruction* next provides that should the above canonical admonitions be disregarded by the person warned, the Ordinary shall then, by means of his *curia*, impose upon him a formal precept or injunction. This command must state clearly and distinctly, (*a*) what the delinquent should

[1] S. Matth. xviii. 15–18.

do or avoid, (*b*) and what specific punishment he will incur, in case he disobeys the injunction.

73. The precept can be imposed only after the canonical warnings of article vi. have been given and disregarded, as is plain from the words: "Quod si monitiones in irritum cedant, etc." Consequently, if a prelate, without first giving the canonical warnings, imposes the precept, and subsequently orders the trial for the violation of the precept, the whole procedure will be invalid, as we show in our *Elements*, Vol. III., Part II., Chapter I.

Art. VIII.

How the Precept is Communicated to the Delinquent.

VIII. "Praeceptum delinquenti a Curiae Cancellario coram Vicario generali injungitur, aut etiam coram duobus testibus ecclesiasticis vel laicis spectatae probitatis."

74. The precept is designed to obtain, *in a compulsory manner*, what the canonical warnings were intended and failed to bring about *in a suasive way*. It partakes more of a judicial than of a paternal character. Consequently it is a heavier punishment than the admonitions, and on that account it is communicated to the delinquent in a more formal and solemn manner. The present article describes these formalities. They may briefly be summed up in the following manner.

75. 1, The precept must, on pain of nullity, be *in writing*; 2, read or communicated to the delinquent *in person*; 3, not by the Bishop himself, but by the chancellor or secretary of the episcopal curia; 4, in the presence either of the vicar-general, or of two proper witnesses; 5, an official record or minutes are written out by the chancellor of the serving of the injunction on the delinquent, in the above manner; 6, this record shall be signed by all present, namely, by the chancellor, the vicar-general, or the two

witnesses, and also by the delinquent himself, if he chooses; 7, the vicar-general can compel the witnesses to swear that they will not divulge the proceedings. For a full explanation of these formalities, see our *Elements*, Vol. III., l. c.

76. How the precept is served on the delinquent, in case he refuses to appear at the episcopal *curia*, or renders himself inaccessible, is explained in the third volume of our *Elements*, and is also manifest from the principles laid down in the second volume of our *Elements*, n. 1005, 1006, 1007, in regard to the mode of serving the citation. Suffice it here to say that the serving or delivering of the *precept* is placed in the case on the same footing with the delivery of *citations*. Consequently the precept, in the case, may be sent to the delinquent by registered mail. This follows also plainly from article xiv. of the *Instructio*, which prescribes the manner of serving, not only citations proper, but all *notificationes et intimationes*, and consequently also the precept, in the case of an accused refusing to appear in the *curia*.

77. Here it will be noticed at once that the precept, both so far as regards its tenor and its service, bears no small resemblance to the canonical admonitions, when given *in forma legali*. On this account, as has been seen, some canonists, apparently not without good reasons, regard the *præceptum* as the real canonical warning, in the strict sense of the term.

78. If the accused will not even heed the precept, and if he thus proves himself incorrigible, nothing remains for the Ordinary but to lay aside the extrajudicial and paternal mode of procedure, outlined in the articles hitherto discussed, and to begin judicial proceedings proper, preparatory to inflicting repressive punishments. These judicial proceedings are given in articles ix., sq., and will be explained by us, one by one, in the following articles. Here two questions present themselves: *First*, is the Ordinary

always bound to give the canonical admonitions and the precept, prior to beginning judicial proceedings looking to the infliction of repressive punishments? *Second*, is the trial itself always necessary before the infliction of repressive punishments?

79. In answer to the first, we remark that the repressive punishments are usually divided by canonists, who wrote prior to the Instruction of the S. C. EE. et RR. June 11, 1880, into *correctional* or medicinal and *punitive*. By correctional punishments (*pœnæ medicinales, censuræ*) they generally understand those which primarily have in view the *amendment or reform* of the offender. By punitive (*pœnæ, pœnæ vindicativæ*) they commonly mean those which aim directly at making the guilty party *suffer and atone for his crimes*.

80. Now, all these canonists maintain, and the sacred canons expressly enact, that, except in the case of censures which are *a jure and latæ sententiæ*, the Ordinary cannot inflict any *correctional* punishment whatever without having previously given first the canonical warning and then a trial. Hence they hold that the Bishop cannot, in the case, begin the trial until he has given the warning. But they also hold that in imposing *vindicatory* punishments, the Ordinary is bound merely to give the trial beforehand, but not the canonical warning.

81. We say "by canonists who wrote prior to the Instruction of 1880." For, according to article ii. of this latter Instruction, and consequently also of the *Instruction* for the United States, all repressive punishments whatever—that is, not merely those which are usually called medicinal, but also those which are named punitive—appear to be primarily medicinal, and only secondarily vindicatory. Thus article ii. of the *Instructio* says: "Hæc vero" (remedia repressiva) "eum in finem constituta sunt, *ut delinquentes ad bonam frugem revocentur*." If this be true, that is, if all repressive

punishments are primarily medicinal, it follows that not only those repressive punishments which are called medicinal, but also those which were formerly termed vindicatory, should be preceded, not only by the trial, but also by the canonical warnings and the precept; that, therefore, excepting in the case of punishments which are *a jure and latæ sententiæ*, the Ordinary should not, as a rule, begin judicial proceedings until he has first given the warnings and the precept.

82. Of course, in those cases where the law allows the Ordinary to inflict suspension *ex informata conscientia*, no previous trial, and consequently no previous canonical warnings or precept are required. Thus the latest *Instructio* of the S. C. de Prop. Fide, on suspensions *ex informata conscientia*, dated Oct. 20, 1884, and embodied in the *Third Plenary Council of Baltimore* (p. 298) enacts, in § 2: "Ideoque ad ejusdem (susp. ex inf. consc.) impositionem non requiruntur nec formæ judiciales, *nec canonicæ monitiones*." However, this same Instruction, § 9, leaves it to the prudent discretion of the Bishop to give the accused paternal admonitions, if he sees fit, prior to inflicting suspension *ex inf. conscientia*.

83. This view appears to be the one taken by the *Third Plenary Council of Baltimore*, held in 1884 (n. 300, 309, 310) and by commentators of the Instruction of 1880, and is certainly in full harmony with the urgent recommendations of the Council of Trent, as we show in the *third* volume of our *Elements*. It also accords well with the spirit of mildness and clemency which pervades the laws of the Church, and which requires that warnings shall precede severer measures or punishments proper. As to the second question, we shall answer it in the next article.

CHAPTER II.

THE CANONICAL SUMMARY TRIAL, OR MODE OF PROCEEDING WHICH MUST BE OBSERVED IN INFLICTING REPRESSIVE PUNISHMENTS.

ART. IX.

Is a Trial Always Necessary Before a Repressive Punishment can be Inflicted?

IX. "Quod vero pertinet ad remedia repressiva seu pœnas animadvertant Ordinarii in suo pleno vigore manere remedium extrajudiciale ex informata conscientia pro occultis reatibus a S. Concilio Tridentino constitutum, Cap. I. sess. 14 de Reform."

84. Having, in the previous articles, laid down the formalities to be observed by Ordinaries when they administer preventive or paternal corrections, the *Instruction*, in the present and succeeding articles, outlines the manner in which Ordinaries are bound to proceed, when they wish to inflict repressive punishments. As we have seen, the Bishop is bound first to give the canonical warnings and next the precept. If the delinquent remains obstinate and persists in his evil course, notwithstanding the admonitions and precept, the Ordinary can then order the trial, with a view to inflicting repressive punishments.

§ 1. *Procedure "Ex Informata Conscientia."*

85. Here, then, it is proper to take up the second question put above, namely: Is the trial, as outlined in the Instruction, always necessary before repressive punishments can be inflicted? It is, except in the one case established by the

Council of Trent, sess. xiv., Cap. I. de Ref. This is clearly the meaning of article ix., now under consideration. For the Instruction, as already shown from its title or heading, prescribes that the trial, or judicial procedure, outlined in it, must precede all repressive punishments. Moreover, in order to avoid any possible misunderstanding, the Sacred Congregation, in the present article, declares that the Tridentine law (sess. xiv., Cap. I. de Ref.), which authorizes Bishops to inflict suspension without a trial, or, as they say, *ex informata conscientia*, in certain exceptional, extraordinary and urgent cases, and even then only when the crime is occult, is not abolished by the *Instruction*, but remains in full force. Hence, according to the rule, *exceptio firmat regulam*, the meaning of article ix. is, that in the one case given by the Council of Trent, the Bishop can inflict a repressive remedy—namely, suspension—without a previous trial; but that, in all other cases, he must give the trial before he can inflict a repressive punishment. For a full and exhaustive treatment of sentences *ex informata conscientia*, see our *Elements of Ecclesiastical Law*, Vol. II., n. 1279, sq. See also the latest *Instructio*, S. C. de P. F., Oct. 20, 1884, in the C. Pl. Balt., iii., p. 298.

86. This view is clearly set forth by the *Third Plenary Council of Baltimore*, held in 1884, n. 310, and is in full accord with the recent decisions of the Holy See, and the common teaching of canonists. Thus the S. C. de P. F., in its Instruction to the Vicar-Apostolic of Cochin China, dated June 1st, 1775, says: "In primis tibi pro regula tenendum est, quod omnia jura vetant ne ad criminum punitionem deveniatur, nisi *prius per probationes a lege præscriptas constet de delicti perpetratione*."[1] Consequently this Sacred Congregation, in the same Instruction, advises the vicar-apostolic to proceed paternally and extrajudicially, that is,

[1] Collectanea S. Sedis, p. 251.

to inflict merely paternal remedies and not punishments proper, even for the crime of solicitation, wherever, owing to the condition of the country, he cannot give the accused a trial, "cum," as the Instruction continues, "justitia non patiatur, ut pœnæ infligantur adversus reos de quorum crimine, tali pacto" (*i.e.*, by trial) "adhuc sufficienter non constat." [1]

87. In like manner, it is the general teaching of canonists that Ordinaries have, indeed, the power to proceed extrajudicially—*i.e.*, without a trial, when there is question of administering a *paternal* correction or a preventive remedy, but that an ecclesiastical trial, at least summary, is always required (except in the one case established by the Council of Trent, sess. xiv., C. I. de Ref.), on pain of nullity of the punishment, before an ecclesiastical punishment proper, whether temporal or spiritual, correctional or vindicatory, or a grave disciplinary correction can be inflicted.[2] See our *Elements*, Vol. II., n. 1281, sq.

88. Here it may be objected that besides the case given by the Council of Trent, sess. xiv., C. I. de Ref., there is another case where no trial is required, namely, when the crime is *notorious*. In reply to this objection, it may be said that, according to the general teaching of canonists, it is always advisable, nay, at least practically speaking, necessary, as a rule, to give the trial also in notorious cases. Thus the *Third Plenary Council of Baltimore*, n. 310, says: "Animadvertant autem episcopi, hoc uno casu excepto (scilicet suspensionis ex inf. consc.) nullam pœnam repressivam adhiberi debere, nisi prævio processu judiciali, ita ut etiam in causis, quæ dicuntur *ex notorio*, omnino consultius sit processum summarium de delicti notorietate instruere, antequam pœna infligatur." We shall, however, treat this

[1] Collect. S. Sedis, p. 252.

[2] Præl. S. Sulp., vol. i., n. 279; Analecta, J. P., ser. 13, 1874.

question more fully at the end of this article. See also our *Elements*, Vol. II., n. 1263, sq.

89. Lastly, we observe, the present article (ix.) teaches that the power to proceed *ex informata conscientia* can be made use of only when the crime is *occult*. This is also expressly decreed in the recent Instruction *supra suspensionibus ex inf. consc.*, issued by the S. C. de P. F., Oct. 20, 1884, for the United States and missionary countries in general. This Instruction says: "Suspensioni ex informata conscientia justam et legitimam causam præbet crimen, seu culpa a suspenso commissa. Hæc autem debet esse *occulta*, et ita gravis, ut talem promereatur punitionem." [1]

90. Therefore, as we note already in our *Elements of Ecclesiastical Law*, Vol. II., n. 1292, sq., the opinion of Bouix, [2] Craisson, [3] Stremler, [4] Santi, [5] and other canonists, who hold that suspensions can be inflicted *ex informata conscientia*, also for *public* crimes, at least where it would be inexpedient to give the accused a trial—*v.g.*, on account of the scandal to the faithful which might be occasioned by a trial, is no longer tenable.

91. Now, when is a crime considered occult, so that suspension can be inflicted for it extrajudicially, or, as they say, *ex informata conscientia?* The above Instruction of Oct. 20, 1884, gives the authentic answer in § 7, thus: "Ad hoc autem ut (culpa) sit occulta requiritur, ut neque in judicium, neque in rumores vulgi deducta sit, neque insuper ejusmodi numero et qualitati personarum cognita sit, unde delictum censeri debeat notorium."

92. Consequently a crime is considered public and no longer occult (*a*) when it has once been brought before the judicial tribunal or curia of the Bishop, or of the secular courts—*v.g.*, when an accusation or complaint has been

[1] Instr. cit., § 6. [2] De Jud., vol. ii., p 325, sq. [3] Man., n. 6017.
[4] Des Peines, p. 316, 323. [5] Præl., l. 5. t. i., n. 18.

judicially made either by the diocesan prosecutor or other person; (*b*) when there is a rumor about it among the people; (*c*) when it is known, for instance, to more than five persons, or even only to one who is talkative and indiscreet—*v.g.*, to a garrulous woman. For a crime known to this number or quality of persons is already regarded as public and notorious. See our *Elements of Eccl. Law*, Vol. II., n. 1309.

93. From this decision of the Holy See, it will be seen that the opinion of those canonists who teach that a crime which is indeed public in itself, can nevertheless be regarded as occult, when it is either *inexpedient* to institute a trial—*v.g.*, because of possible scandal, or when it is *difficult* or even impossible to prove the crime juridically—*v.g.*, because the witnesses refuse to testify, is now altogether untenable. For the Instruction of Oct. 20, 1884, expressly says, in n. 13: "Cæterum ex quo istiusmodi pœna est remedium *omnino extraordinarium*, præ oculis habeant Prælati quod reprehensibilis foret episcopus, si in sua synodo declararet, se deinceps ex privata tantum scientia cum pœna suspensionis a divinis animadversurum in clericos, quos graviter deliquisse compererit, quamvis eorum delictum *non possit in foro externo concludenter probari, aut illud non expediat in aliorum notitiam deducere.*"

94. However, when a person is guilty of several crimes, some of which are public, and others occult, the Bishop can inflict suspension *ex informata conscientia* for the one or several crimes which are occult, even though the others are public. The same holds where the crime was occult before the suspension and became public only after it. Thus the above Instruction of Oct. 20, 1884, § 8, enacts: "Verum tenet etiam supensio si ex pluribus delictis aliquod fuerit notum in vulgus; aut si crimen, quod ante suspensionem fuerat occultum, deinceps post ipsam fuerit ab aliis evulgatum." The Instruction, § 5, moreover, expressly states

that suspensions *ex informata conscientia* cannot be inflicted *in perpetuum*. See our *Elements of Eccl. Law*, Vol. II., n. 1316.

95. Finally, the mere fact that a crime is occult does not, of itself, warrant the procedure *ex informata conscientia*. For even occult crimes should be punished only by trial, save when there are very grave and urgent reasons for not instituting a trial. See our *Elements*, Vol. II., n. 1306, 1307. This is clearly indicated by the S. C. de Prop. Fide, in its response to the *Dubia* regarding the Instruction of July 20, 1878, and also in the recent Instruction of Oct. 20, 1884. Thus the latter Instruction says in n. 13: "Cæterum ex quo istiusmodi pœna est remedium *omnino extraordinarium*, etc."

96. Lastly, the *Instructio* of Oct. 20, 1884, enacts, § 6: "Suspensioni ex informata conscientia justam ac legitimam causam præbet *crimen*, seu culpa a suspenso commissa. Hæc autem debet esse *occulta*, et *ita gravis*, ut talem promereatur punitionem." Hence censures or suspensions *ex informata conscientia* cannot be inflicted, even for a short time, or in a mild form for *light* or *venial* offences.

§ 2. *Procedure "Ex Notorio."*

97. We have said above that, at least practically speaking, a trial is, as a rule, necessary also in notorious crimes, before a punishment, censure, or grave disciplinary correction can be inflicted for such crimes. In order to understand this whole matter more fully, we shall here explain the procedure *ex notorio*, as laid down in the sacred canons, under these three heads: 1. What are notorious crimes? 2. What is the mode of inflicting punishments for notorious crimes? 3. What are the legal or canonical remedies against this procedure or mode of inflicting punishment?

98. I. *What are notorious crimes?* A crime is notorious either by notoriety of law (*notorietas juris*) or by notoriety of fact (*notorietas facti*). Here we speak merely of crimes notorious by fact, and not of those which are notorious by

law. For the procedure *ex notorio* applies only to those crimes which are notorious by *notorietas facti* and not to those which are notorious by *notorietas juris*.[1] Our *Elements*, Vol. II., n. 1253, sq.

99. Now, a crime is notorious by fact when it is perpetrated in the presence and sight either of the *whole* or at least of the *greater part* of the community, neighborhood, parish or place, so that it can be in no wise concealed or denied. Such, for instance, was the crime of the incestuous Corinthian mentioned by St. Paul, I. Cor. v. 1, 5. See our *Elements*, Vol. II., n. 1254.

100. A crime may be notorious by fact in three ways, namely, permanently, interruptedly, and transiently. It is notorious *permanently* (*notorium facti permanentis*) when it exhibits itself notoriously and has a *continued* existence, so that it can be seen by all, not merely once or several times, but constantly.[2] A notorious crime of this kind is, for instance, that of a person who openly keeps a concubine in his house, eats and sleeps with her, and has children by her.[3] The crime is notorious *interruptedly* (*notorium facti interpolati*) when it is (*a*) perpetrated notoriously (*b*) and repeated a number of times—*e.g.*, when a person curses notoriously and often—but yet is not committed continually and permanently. The crime is notorious *transiently* (*notorium facti transeuntis seu momentanei*) when it is committed indeed in the sight of the entire or greater part of the community, *once, or perhaps twice*, but has no further continuity.

101. However, in order that a crime may be notorious, in the canonical sense, and punishable *ex notorio*, it must be notorious not only *materially*, but also *formally*. In other words, not only the *act itself* or offence must be notorious, but also the *malice* of the offender. That is, the delinquent must not merely perpetrate the crime in the sight of the

[1] München, Can. Trials, vol. i., p. 447, n. 3. [2] Schmalzg., l. 5, t. i., n. 2. [3] Ib.

community, but he must perpetrate it in such a manner that it can be and is readily seen by all that he has committed the offence *knowingly, willfully, and maliciously.*[1] See our *Elements*, l. c., n. 1262.

102. II. *Mode of procedure against notorious crimes.*—The law of the Church, as laid down in the sacred canons and explained by canonists, is that the Ordinary can punish notorious crimes—whether they be notorious permanently, interruptedly, or transiently—without a previous trial, provided, however, it is certain, beyond any doubt whatever, that they are really and truly notorious, not only materially, but also formally. See our *Elements*, Vol. II., n. 1259.

103. We say, *provided it is certain*, etc.; for, while the crime itself need not be proved, its notoriety being its proof, the fact that it is really notorious, and that both materially and formally is a question of *fact*, and must therefore be legitimately *proved* like any other fact—*e.g.*, by at least two witnesses. Nay, the fact of notoriety must not only be proved legitimately, but must be, moreover, juridically declared; that is, the judge must at least, as a rule, also declare by judicial sentence that the crime is really notorious, both formally and materially. See our *Elements*, l. c., n. 1260, 1261.

104. We have just said, *at least as a rule.* For Schmalzgrueber holds that a *sententia notorii declaratoria* is not necessary, (*a*) when the delinquent does not deny that the crime is notorious, (*b*) when the crime is notorious *permanently.*[2] Others, however, deny this, and teach that the juridical declaration of the existence of notoriety is always obligatory, on pain of nullity of the proceedings.[3] Whatever may be said on this question, *all* canonists, without exception, say that it is safer for the judge to issue this declaration, even in the two cases excepted by Schmalzgrueber.[4]

[1] Schmalzg., l. c., n. 15.
[2] Ib., l. 5, t. i., n. 11.
[3] Reiff., l. 5, t. i., n. 264.
[4] Schmalzg., l. c.

105. We have seen that the procedure *ex notorio* can be adopted only when it is certain, beyond any doubt, that the crime is really notorious, both materially and formally. This is admitted by all canonists. Thus Schmalzgrueber[1] says: "Quando aliqua potest reo competere defensio, vel dubium sit an non competat, vel possit competere, tunc omnino necessaria foret citatio (citation for trial, not merely for sentence), ut communiter ab omnibus receptum testatur Farinac." Hence, wherever there is any *doubt* whether the crime is notorious materially and formally, a trial must be given to the supposed delinquent.[2] Consequently, also, when the supposed delinquent objects that his alleged offence is not notorious in both respects, and gives plausible reasons for his objection, he must be given a trial.

106. Now, it is a most difficult thing to show or prove legitimately that a crime is really notorious, both materially and formally, at least in the case of the *notorium facti transeuntis* or even *interpolati*. For a person may notoriously commit an offence—*e.g.*, he may become drunk before a large number of persons; yet he may have fallen into the crime without moral responsibility; thus he may have been temporarily insane, or he may have acted under fear,—misapprehension, etc. This difficulty is one of the reasons why the procedure has fallen into disuse.

107. We say, at least in the case of *notorium facti transeuntis*, etc. For, in the case of the *notorium facti permanentis*, this difficulty is not so great, as is plain. Hence München also holds that the mode of procedure *ex notorio*—*i.e.*, the infliction of punishment without a previous trial, applies only to crimes which are notorious *facti permanentis*.[3]

108. It is also owing to these difficulties that all canonists, without exception, strongly advise, that no matter how completely and plainly notorious a crime may appear to be,

[1] Schmalzg., l. c., n. 10. [2] Ib., n. 10. [3] München, l. c., vol. i., p. 447.

punishment should not be inflicted upon the delinquent without a previous trial. Thus Schmalzgrueber writes:[1] "Ideo honestius tutiusque aget, si qualecunque delictum videatur esse notorium, super ejus notorietate recipiat depositiones testium. . . imo non facile omittet ipsam etiam citationem (to appear for trial) et monitionem rei." Reiffenstuel likewise teaches: "Doctores communiter et praxis suadent, ne judex aliquem etiam notorie delinquentem, sine citatione et sententia condemnet; tum quia citatio, quæ principaliter eo tendit, ut reus prius audiatur, et defendere se valeat, videtur esse juris naturalis; tum quia multa dicuntur notoria, quæ non sunt."[2]

109. In like manner Stremler writes: "Du reste, suivant l'avis de tous les canonistes, lors même que le délit *serait notoire matériellement et formellement*, le juge agira sagement en se conformant *à toutes les règles de la procédure*, afin d'éviter toute erreur, toute injustice qui pourrait résulter de leur omission. Ainsi il doit citer le coupable, entendre les témoins, porter la sentence par écrit etc., parce que souvent comme le disent les saints canons, bien des choses paraissent notoires qui en réalité ne le sont pas. *Telle est la pratique ordinaire et universelle de tous les tribunaux, et on ne saurait s'en affranchir sans témérité.* Tout ce qui vient d'être dit des délits notoires doit aussi s'appliquer aux délits flagrants. *Le droit ancien, touchant ces deux espèces de délits, est tombé en désuetude et, aujourd'hui, ils sont assimilés aux autres delits.*"[3] Craisson (n. 600) also writes: "Prudenter aget judex si, etiam in notoriis, consuetas judiciorum regulas observet."

110. III. *Remedies against sentences "ex notorio."*—While, as we have seen, by the strict letter of the law, no previous trial is required for punishing notorious crimes, and consequently the offender need not be cited for trial, yet he must, at least as a rule, be cited to hear the sentence of con-

[1] L. c., n. 16. [2] Reiff., l. 5, t. i., n. 266. [3] Stremler, des Peines, p. 82.

demnation pronounced against him, and to show cause why it should not be pronounced. For the formula of this sentence, see our *Elements*, Vol. II., n. 1261.

111. We say, *at least as a rule;* for Schmalzgrueber, l. c., n. 10, excepts the case where the delay occasioned by the *citatio ad sententiam* would redound to the prejudice of the public by reason of the scandal that would follow. However, Reiffenstuel (l. c., 264) and others do not admit this exception. Whatever may be said as to the necessity of always citing the accused to hear the sentence, it is certain that, before inflicting punishment, the judge must always pronounce sentence of condemnation and communicate it properly to the delinquent.

112. *Q.* What are the canonical remedies against sentences *ex notorio?*

A. There is no suspensive appeal against the sentence of condemnation in notorious crimes,[1] provided the sentence expressly states that the punishment is being inflicted upon the delinquent for being guilty of notorious crimes.[2]

113. We say, *suspensive appeal;* for it is allowed to appeal *in devolutivo* against such sentences.[3] We say, moreover, "sentence of *condemnation;*" for an appeal, even *in suspensivo*, lies against the superior's declaration that the crime is notorious.[4] Hence, where a person appeals against the sentence *ex notorio* and alleges in his appeal a reasonable cause, tending to show that it is doubtful whether the crime is notorious, either materially or formally, the appeal has a suspensive effect.[5] We say, also, *provided the sentence expressly states*, etc.; for if the ecclesiastical judge fails to make the above statement in his sentence, an appeal *in suspensivo* lies against his sentence.[6]

[1] Cap. Consuluit 14, de app. (II. 28); Barbosa, l. 2, t. 28, in cap. Consuluit, cit., n. 1, 2, 3.

[2] Schmalzg., l. c., n. 12. [3] Barbosa, l. c., n. 4. [4] Reiff., l. c., n. 261.

[5] Barbosa, l. c., n. 6. [6] Schmalzg., l. c., n. 12.

114. Again, where the punishment inflicted *ex notorio* is considered too severe, it is allowed to appeal *in suspensivo* against such excessive severity. Moreover, it is allowed to appeal *in suspensivo* in merely *manifestis;* for *manifesta* and *notoria* are not the same thing.[1] Finally, an appeal *in suspensivo* lies in the *notorium probationis*, in the *notorium juris*, and in the *notorium per famam.*[2]

115. From all the above, it will readily be seen that the law of the Church, while allowing of punishments to be inflicted *ex notorio*, and without a previous trial, as unanimously interpreted by canonists, also hedges in this power with so many limitations and restrictions, and requires so many conditions, in order that a crime may be truly and really notorious, that, practically speaking, it becomes very difficult and unsafe for the Ordinary to adopt the procedure *ex notorio* in any given case. Hence all canonists strongly advise, as we have seen, that it is always better and safer for the Ordinary to give the accused a previous trial, before inflicting punishment upon him, even when the crime seems notorious in every way.

Art. X.

Form of Trial.—Various Classes of Crimes which are Triable and Punishable.

X. "In actione criminali vel ob præcepti inobservantiam, vel ob communes reatus, vel ob ecclesiasticarum legum transgressiones, processus summarie et sine strepitu judicii, servatis semper in tota sua substantia justitiæ regulis, conficiatur."

116. In the foregoing article, we have seen that a trial must precede all repressive punishments, except in the case stated. Now, these punishments can be inflicted only for crimes, as is evident from the rule: *Sine culpa, nisi subsit causa, non est aliquis puniendus.* Reg. XXIII., de Reg. Jur. in

[1] Barbosa, l. c., n. 9. [2] Ib., n. 8.

6°. See our *Elements*, Vol. III., Part I., Chapter I. The present article (*a*) indicates the various kinds of offences for which ecclesiastics (the *Instruction* lays down the mode of procedure against *ecclesiastics*, not *laics*) can be placed on a criminal trial, and if found guilty, punished; (*b*) states that the trial is to be conducted in a summary manner.

§ 1. *Different Classes of Crimes Punishable.*

117. As to the different classes of crimes, the present article points out three: (*a*) transgression of the injunction, which we have discussed above, under articles vii. and viii.; (*b*) common crimes (*reatus communes*); (*c*) violation of ecclesiastical laws. We shall briefly explain each of these kinds of offences.

118. I. *Common crimes, "reatus communes, delicta communia."*—Canonists usually divide crimes, by reason of the persons by whom they are committed,[1] into (*a*) *delicta communia* or *reatus communes*, namely, those which can be committed alike by ecclesiastics and laics—*e.g.*, drunkenness, immorality; (*b*) and *delicta specialia*, that is, those which can be committed by ecclesiastics only. Thus the Church has made various enactments regulating the manner in which ecclesiastics should perform the duties of the ecclesiastical offices

[1] Canonists also divide crimes, by reason of the forum in which they are justiciable, into ecclesiastical, secular, and mixed. By *ecclesiastical*, they mean those which offend directly against faith, religion, and ecclesiastical discipline - *v.g.*, apostasy, profanation of the sacraments, and which are punishable only in the ecclesiastical forum.

Purely secular or civil offences are those which offend against the civil or secular law, and are punishable by the secular power.

Finally, *mixed* offences are those which are injurious both to the Church and State—*v g.*, drunkenness, and which, in consequence, are punishable both by the Church and State. (Præl. S. Sulp., n. 717; München, vol. ii., p. 73.) In the light of this division, it is possible that the Instruction may mean, by *reatus communes*, those offences which are called mixed; and by *transgressio legum ecclesiasticarum*, those which are ecclesiastical.

committed to them, administer the sacraments, etc. She has also laid down salutary rules which they are bound to observe in their life and conduct. For instance, she forbids them to frequent theatres, to carry arms, to go hunting in too noisy and public a manner, to wear a secular dress, etc. A violation of these laws is indeed a *violatio legum Ecclesiæ*, though not a *reatus communis*. Thus it will be seen that what is allowed in laics is often forbidden, and therefore criminal, in ecclesiastics.[1] By *communis reatus*, then, the Instruction seems to understand the offences which are common to laics and ecclesiastics, as just explained.

119. II. *Ecclesiasticarum legum transgressio.*—By the violation of ecclesiastical laws, the Instruction appears to mean the *delicta specialia* just explained, namely, the violation of those laws of the Church which relate peculiarly and solely to ecclesiastics, as such—namely, to their manner of living, to the rights and duties of their state.

120. III. *Præcepti inobservantia.*—The precept here meant is that which is described under articles vii. and viii. We have already seen that the precept cannot be imposed except upon an ecclesiastic who is already on the direct road to crime, or is guilty of scandal. Yet there may be a violation of a precept, and still there may be no other crime, in the legal and canonical acceptation of the term. Thus an ecclesiastic may be in the proximate danger of becoming a drunkard, because he is in the habit of visiting a certain saloon or house. Certainly the Bishop can warn and command him, in the manner laid down in articles v., vi., vii., viii., not to go there again, and he can punish him if he disobeys, even though he does not get drunk. Here there is a transgression of the precept, if the ecclesiastic disobeys, and yet there is no crime, in the canonical acceptation of the term, apart from the disobedience in the case. Of

[1] See *de vita et honestate clericorum*, l. 3, t. i.; in 6°, l. 3, t. i.; Clem. Eod., l. 3, t. i.

course in this case the punishment could not be as severe as if the delinquent had actually become drunk.

121. Still, as a rule, the violation of the precept or injunction will be found combined either with the commission of the *reatus communes*, or with the *transgressio legum ecclesiasticarum*. For, as has been seen, an ecclesiastic who is guilty of these offences must, before being put on a criminal trial, be given the canonical warnings and the precept. And if he obeys, and repairs the scandal or injury he has given, nothing else should be done. It is only when he disobeys the warning and the precept, as we have shown, that he can be put on trial, and, if convicted, punished.

122. From what has been said, it will be understood in what sense the *Instruction* states that the Ordinary may institute a criminal action or trial *disjunctively* for the violation of the precept, *or* common crimes, *or* the transgression of ecclesiastical laws.

§ 2. *Nature of the Trial.*

123. Having explained the first part of the article under consideration, we come now to the second, which states that the trial shall be conducted *in a summary manner*. As we say in our *Elements* (Vol. II., n. 1275), apart from a special mandate of the Pope, the formalities of solemn or ordinary canonical trials must always be observed *in criminal and disciplinary causes*, the summary trial being applicable only to civil causes. Thus Pope Clement V., who in his Constitution *Sæpe* (Clem. V. 11) describes and defines the manner in which the summary trial is to be conducted, also enumerates, in his Decree *Dispendiosam* (II. 1) the various causes which can be disposed of in a summary way. These causes refer to ecclesiastical elections, appointments to ecclesiastical offices and the like, but not to the punishment of offences. See our *Elements*, Vol. II., n. 1273, sq.

124. From this rule of canon law, as established by Pope Clement V., which is still in force, the Holy See, by the Instruction of the S. C. EE. et RR., June 11, 1880, (§ ix.) granted a *conditional* dispensation, by allowing ecclesiastical courts of non-missionary countries to make use of the summary and simple form of trial outlined in the Instruction, wherever the formalities of ordinary trials could not be freely and effectively observed.[1]

125. In the present *Instruction* of the S. C. de P. F. for the United States, the Holy See goes a step farther, and grants an unconditional dispensation from the general law, by authorizing our Bishops to make use of the summary canonical trial in criminal and disciplinary causes of ecclesiastics, without making this concession dependent *upon the impossibility or impracticability* of carrying out the formalities of formal trials. It may therefore be said that, so far as the *formalities* of the proceedings are concerned, the trial laid down in the Instruction is substantially the same as that given by Pope Clement V.,[2] but that so far as regards the causes triable by it, it differs from the summary canonical trial of Pope Clement V., in this, that it applies to criminal causes, whereas the former extends only to civil.

126. Hence we do not agree with the *Acta S. Sedis*,[3] when it holds that owing to this difference the trial of the Instruction of 1880 is *entirely* different from the summary trial, as defined in canon law, namely, in the two above decretals of Pope Clement V.

127. *Q.* What is meant by a summary canonical trial? What are the formalities of ordinary trials that can be omitted or must be observed in summary trials?

A. For the answer, we must refer the reader to our *Ele-*

[1] Instr. cit., art. ix.; our *Elements*, vol. ii., n. 1277. The Instruction of 1880 is given in full in our *Elements*, vol. ii., p. 424, sq.

[2] Rota, Enchir., p. 400, sq. [3] Vol. xv., p. 384.

ments, Vol. II., n. 1265, where we discuss these questions *ex professo*. Suffice it here to repeat that in the summary trial only certain *accidental* formalities can be omitted, but that nothing can be set aside which is *substantial* or essential to judicial proceedings, as pointed out in our *Elements*, Vol. II., n. 693, 694, 696, 698, 704, 1267.[1]

128. Accordingly, in summary trials, as defined by Pope Clement V., and understood in the present *Instruction* of the S. C. de P. F., it is allowed to omit the formalities of ordinary trials respecting (*a*) the formal tendering of the charge —*oblatio libelli*, (*b*) and the plea or *litis contestatio*, both of which can be made informally, as we shall see; (*c*) the ecclesiastical judge can abbreviate the terms or delays usually granted to the parties—*v.g.*, either to propose or to deny the specifications of the crime; to produce or reply to the proofs, etc.; (*d*) he can also repress or restrain within due bounds the too prolix and diffuse discussions of the prosecutors and advocates; (*e*) and decline to admit too great a multitude of witnesses. For other omissions, see our *Elements*, Vol. II., n. 1269.

129. But the ecclesiastical judge cannot leave out anything which is essential to judicial proceedings. In other words, he must, as the *Instruction* (art. x.) says, always observe, *in their entirety*,—*in tota sua substantia*—the rules of justice. Consequently, both according to the Constitution of Pope Clement V., and also the *Instruction*, he is bound (*a*) to cite the accused for trial; (*b*) while no formal accusation or *oblatio libelli* is necessary, as just seen, an informal one is required. In other words, it is sufficient and necessary that the plaintiff, or diocesan prosecutor, in the beginning of the proceedings, states or presents his petition, demand, complaint, or accusation before the judge, without any formal-

[1] This is plainly stated in the Instruction, when it says: "Servatis semper in tota sua substantia justitiæ regulis."

ity, though in a clear, distinct, and specific manner, and that either in writing or orally. If he does so orally, it must be forthwith written down by the secretary of the court, and filed among the acts of the case.

130. (*c*) Though no formal *litis contestatio* is prescribed, as seen, an informal one is essential; that is, the complaint or accusation must be divided into distinct heads, counts or specifications, called *positiones* in civil causes, and *capitula*, in criminal, and these must be communicated to the defendant for his denial or admission. The answer of the defendant to these counts forms the *litis contestatio*. (*d*) Unless the litigants agree otherwise, the judge can assign *one and the same day or term* to the plaintiff or diocesan promoter and to the defendant "ad exhibendum omnia acta et munimenta"—*i.e.*, he can order that the prosecution shall produce all its proofs, witnesses, etc., and the accused his counter-witnesses, documents, etc., within one and the same term.

131. (*e*) The proofs submitted by the prosecution must be as full and complete as in solemn canonical trials. (*f*) The right of defence remains as unimpaired as in formal canonical trials. (*g*) The judge can ask questions at any time during the trial. (*h*) He must pronounce sentence in writing.[1] See our *Elements*, Vol. II., n. 1270. A cursory glance will show that all these enactments of the Clementine Constitution are fully confirmed and retained by the Instruction. The ecclesiastical judge, then, should never refuse to admit any testimony or acts, whether submitted by the prosecution or the defence, that are calculated to throw light on the case or clear up the facts in dispute.

132. From what has been said, it is plain (*a*) that the trial laid down in the present *Instruction* is a *processus canonicus*, or canonical trial proper, in the full sense of the term. This is evident, among other proofs, from the fact that the *In-*

[1] Clem. Sæpe 2, de V. S. (v. 11.)

struction expressly calls it a *processus*, and moreover, enacts that appeals shall have a suspensive, not merely a devolutive effect. Herein lies one of the main differences between the trial or rather judicial investigation, prescribed by the Instruction of July 20, 1878, and the trial outlined in the present *Instruction*. The latter is, as we have just said, a trial proper, or *processus canonicus*, since it complies with all the essential formalities of trials prescribed by the sacred canons. The former is, indeed, as we show in our *Elements*, Vol. II., n. 730, a judicial procedure, but yet is lacking in some of the substantial forms prescribed by canon law for trials proper, and is therefore not a canonical trial, formal or summary.

Art. XI.

Manner of Beginning the Trial.

XI. "Processus ex officio instruitur, vel accepto supplici libello, vel accusatione, vel nuncio quoquomodo ad Curiam perlato, et usque ad terminum perducitur eo consilio ut omni studio ac prudentia veritas delegatur, ac tum de crimine tum de reitate vel innocentia accusati causa eliquetur."

133. In the preceding article we have discussed the different categories of offences for which an ecclesiastic can be placed on trial, and also the form of trial. The present article goes a step farther and shows how the trial is actually commenced. It enacts that the ecclesiastical judge can begin the trial *ex officio*, as soon as sufficient reasons for so doing are furnished either by denunciations, accusations and complaints, or by any other means.[1] The judge, therefore, proceeds *ex officio*. Consequently the trial is begun and conducted *per viam inquisitionis*, and not *per viam accusationis*. However, while it is true that the ecclesiastical judge proceeds *ex officio*, it is nevertheless also true that he does

[1] Cf. Prague Instruction, § 55.

not proceed absolutely or wholly *ex officio*, since he proceeds only at the instance of the diocesan prosecutor, who takes the place of the accuser throughout the entire trial. Consequently the mode of procedure of the Instruction holds the mean between that of accusation and inquiry. In other words, it is the *summary canonical trial by way of inquiry, blended with that of accusation.* It is the procedure by way of inquiry, not indeed *ex mero officio*, but *instante promotore fiscali.* See our *Elements*, Vol. II., n. 954, sq.

134. This mode of procedure appears more in harmony with the nature of things than that of pure, absolute inquiry. Justice seems to require that the judge should be so placed as to be left perfectly unbiassed in his judgment. He should resemble the statue of justice, having its eyes blindfolded and holding in its hands the scale of justice evenly balanced, inclining neither one way nor the other. Accordingly it seems proper that the accuser and the judge should not be one and the same person. Even Pope Innocent III., who brought the procedure by way of inquiry into prominence, acknowledges this principle, by enacting that *fama* or common report shall be regarded as taking the place of the accuser. It is no wonder, then, that soon after the time of Pope Innocent III. the practice of having a third person, either a private individual or a public official, to intervene at trials, as accuser, became again universally prevalent in ecclesiastical courts.

135. The Instruction, as we shall explain more fully under article xiii., makes it absolutely necessary that a public official, called diocesan prosecutor (*procurator fiscalis*), shall be appointed in every episcopal court, whose right and duty it shall be to act as accuser in criminal and disciplinary causes of ecclesiastics. Private individuals have still, even according to the Instruction, the right to make complaints or accusations. But these complaints are regarded merely as information upon which the diocesan

prosecutor may base his official charges, and which may move the Ordinary to begin the trial. The making of the formal charge or accusation, with all its legal effects, is now reserved, at least practically speaking, to the *procurator fiscalis.*[1]

136. The meaning, then, of article xi. now under discussion is, that the bishop or ecclesiastical judge, having extrajudicially received information, either through complaints, denunciations, accusations, or through other sources, that a certain ecclesiastic, after having been warned and given the precept, is guilty of a crime punishable by ecclesiastical law; and having, moreover, ascertained, in an extrajudicial manner, that there exists common fame, *fama communis*, in regard to the alleged offence; and having also informally and extrajudicially obtained full or at least half proof of guilt, can, *ex officio*, begin the special judicial inquiry, by ordering the diocesan prosecutor to draw up the formal charges and thus to commence judicial proceedings.

137. We say first, *either through complaints*, etc.; here it is plain that, before taking any action on these complaints or accusations, the Ordinary should carefully examine whether the persons making the complaints are good and trustworthy, or whether they are animated by ill-will or other unworthy motives.

138. We say, moreover, *after having been warned*, etc.; for, as we have seen, the Bishop cannot, as a rule, institute judicial proceedings looking toward the infliction of *remedia repressiva*, until he has first imposed the *remedia preventiva.*

139. We say, *is guilty of a crime punishable*, etc.; for, unless such an offence were charged, no punishment could be inflicted, and the trial would be absolutely null and void and worse than useless. The various classes of punishable crimes are enumerated above, under article x.

[1] De Brabandere, vol. ii., n. 1211; Ferrari, Summ., n. 892, note 1.

140. We say again, *and having also ascertained that there exists common fame;* for, as we show in our *Elements of Ecclesiastical Law*, Vol. II., n. 955, the ecclesiastical judge cannot, except in a few cases enumerated in our *Elements*, Vol. II., n. 957, begin *ex officio* a special judicial inquiry or investigation against any one who has not been previously designated by *public opinion* or *common report* (*infamia facti*) as the party guilty of the crime for which the inquiry is to be instituted. In other words, the *fama communis* or *infamia facti* must precede a special judicial investigation made *ex officio*. This holds so strictly that when the Ordinary begins such an inquiry, where there is no previous common report, all his acts and proceedings are null and void. Our *Elements*, Vol. II., n. 958. Here it should also be observed that complaints or denunciations do not supply the place of common report: and the *infamia facti* is required also, where a complaint is lodged. Acta S. Sedis, Vol. XVIII., p. 60; our *Elements*, Vol. II., n. 944.

141. The reason is obvious. For, so long as the crime committed by an ecclesiastic is occult, such ecclesiastic remains in possession of his good name, and therefore has the right not to have this good name taken away from him. Consequently the ecclesiastical superior has no right to destroy this good name by ordering a trial and thus defaming him,[1] save, perhaps, in the few cases given in our *Elements*, Vol. II., n. 957. This will become still more apparent when we remember that, according to the Roman law,[2] adopted by the Church, a good reputation is to be preferred to any temporal emolument, nay, it should be as dear as life itself.[3] Hence the poet very justly writes:

"Omnia si perdas, famam servare memento;
Qua semel amissa, postea nullus eris."

142. If this is true of every person, it holds true especially

[1] Our *Elements*, vol. ii., n. 956; Rota, l. c., p. 278.
[2] L. Julianus, 26 ff. (29, 4). [3] L. Justa., 9 ff. de Man. vind. (40, 2).

of ecclesiastics and priests. For, in their case, the loss of good name is not merely hurtful to themselves, but detrimental to religion, and destroys their usefulness.[1] Hence the law of the Church is based on justice and equity, when it enacts that, except, perhaps, in a few cases, the Ordinary cannot *ex officio* begin a special judicial investigation against an ecclesiastic, where there exists no previous common fame, and where, consequently, the ecclesiastic has not, as yet, lost his good name.

143. This entire teaching concerning the necessity of previous *fama communis* is fully confirmed and applied to trials conducted under both the Instruction of June 11, 1880, and the *Instruction* for this country, by a recent celebrated decision of the Holy See, given by the S. C. C. on April 18, 1885. The case decided was the following: A certain priest of Milan, named David, was accused before the Archbishop of Milan of having said mass after he had taken his breakfast. Thereupon the Archbishop instituted judicial proceedings against him. The *curia* found him guilty. He appealed to the S. C. C. against the final sentence of the Metropolitan Court. His advocate at Rome urged, among other things, that the whole trial was null and void, because, although David had been accused before the Archbishop of the above offense by two persons, yet there existed no previous *common report* or *infamia facti*. The S. C. C. decided twice, first on 20 Dec., 1884, and then again on the 18th of April, 1885, that the sentence pronounced by the *curia* of Milan must be reversed. See Acta S. Sedis, Vol. XVIII., p. 56, sq., 1885.

144. We say also, *and having, moreover, obtained full or at least half proof of guilt;* for, as we show in our *Elements*, Vol. II., n. 994, a common report is of itself not sufficient to authorize the Ordinary to proceed to a special judicial inquiry. He cannot proceed to such an inquiry unless

[1] Rota, l. c., p. 279.

there exists, besides *fama communis*, also at least half proof of guilt.[1] Only when the Ordinary has found that there is common report, and also at least half proof, can he begin a special judicial investigation by ordering the prosecutor to prefer charges. All this is fully and clearly brought out in the above case decided by the Holy See. See Acta S. Sedis, l. c., pp. 60, 74.

145. We also say, *informally* and *extrajudicially;* because, as we have seen, in speaking of the information gathered by the Bishop, prior to imposing preventive remedies, the Bishop, or diocesan prosecutor, acting by order of the Bishop, is not bound to observe any judicial formality in ascertaining whether there is sufficient cause for ordering the first steps of the trial, namely, the drawing up of the charge and the *processus informativus*. From what has been said it follows that a trial or special judicial inquiry should not be ordered or begun except for crimes which are *very grave* and also give *public scandal;* that, consequently, the superior should dissemble and overlook the lighter offences and those which give no scandal, rather than institute judicial proceedings and inflict repressive punishments on their account.[2]

146. We say, *orders the diocesan prosecutor to draw up the official charges*. The first step in all judicial proceedings, whether by way of accusation or investigation, is the presenting to the judge the charges or bill of complaint, and demanding that he shall proceed against the accused. See our *Elements*, Vol. II., n. 985. This is done by the diocesan prosecutor. This is proper. For, whatever is done against the accused, should be done at the instance of this public official, lest, otherwise, if the judge proceeds *proprio motu*,

[1] We say, *at least;* for, as appears from the decision of the S. C. C., 18 April, 1885, there should be the fullest proofs possible,—*probationes certissimæ;* they should be so strong that nothing else but the confession of the accused seems necessary. (Acta S. Sedis, vol. xviii., p. 60; Schmalzg., l. c., t. i., n. 224.)

[2] Arg. Cap. *Inquis.* 21 (v. i.); L. *levia*, 6 ff. de inq.; Schmalzg., l. 5, t. i., n. 186.

he would seem to act both as plaintiff or accuser and judge, and thus perform two kinds of incompatible functions.

147. While, however, the formal or legal charge (*libellus denunciatorius, accusatorius*) is formulated or framed and presented by the prosecutor, and by him alone—for he alone is the officially recognized accuser—yet he cannot do so, unless he has either a general or a special mandate to that effect from the Bishop. The reason is that, as we have seen, the Ordinary alone has discretionary power to decide whether and when judicial proceedings shall be begun against an ecclesiastic.

148. Where, then, the fiscal procurator, whether by special or general mandate of the Ordinary, is about to present charges, he should naturally, before doing so, go over all the evidence in hand, and, if necessary, make further inquiries, carefully indeed, but discreetly, extrajudicially and unostentatiously, in order that he may be able to make the charges in a clear, specific, and detailed manner. He should frame the bill of charges with care, since it forms the basis of the whole trial, and can, indeed, be changed prior to the *litis contestatio,* but not after that. See our *Elements*, Vol. II., n. 991.

149. As to the formalities required in making the charge, suffice it here to remind the reader that the trial of the Instruction is a summary, not a formal one; that, therefore, the prosecutor need not make the charge with the formalities prescribed for ordinary trials; that, in fact, all that is necessary is, that he shall make the charge either orally [1] or in writing, and that the charge, no matter in what form it is made or presented, or in what terms it is couched, shall set forth the offence charged in a clear and specific manner. He concludes his official, though informal, charge by asking that the judge shall proceed against the accused

[1] If made orally, it must be forthwith written down by the chancellor, as dictated by the prosecutor.

prout de jure; but he does not specify the punishment to be inflicted. It is advisable, also, though not necessary, for the prosecutor to conclude his charge with this or a similar general formula: "Isto, et omni alio meliori modo, etc."[1]

150. Having drawn up the charge (*libellus accusationis*), he presents it at the episcopal chancery, where the chancellor writes on it the date of its presentation, and then files it among the acts of the case.[2] The subsequent steps the prosecutor must leave in the hands of the Bishop.

151. Here it is well to remember that the diocesan prosecutor represents the diocese and the interests of religion and justice; that it is just as much in the interest of the diocese, religion and justice to protect and acquit the innocent, as it is to punish the guilty. Consequently, while the *onus probandi delictum* lies upon the prosecutor, he should collect not only what is damaging, but also what is favorable to the accused. Hence also the Prague Instruction correctly ordains: "The ecclesiastical court is also bound, in criminal causes, to order and perform *ex officio* all those things which may serve to arrive at a complete knowledge of the truth."[3] Consequently the *Instruction* says (art. xi.) that the object and aim of the trial is to find out the truth, that is, whether the accused is innocent or guilty. Accordingly, both the prosecutor and the ecclesiastical judge should try to establish the innocence of the accused, no less than his guilt.

[1] Pellegr., P. iv., Sect. i., n. 52. [2] Droste, p. 112. [3] Art. lvi.

Art. XII.

The Preliminary Trial, or Special Judicial Inquiry which Precedes the Citation of the Accused.

(*Processus pro Informatione Curiæ.*)

XII. "Ubi Curiæ jam constitutae sunt, compilatio processus committi potest probo ac perito viro ecclesiastico, cui assistat actuarius. In diœcesibus vero, in quibus Curiæ Episcopales nondum possint institui, interim observanda est Instructio anni 1878, cum responsione eam subsequenti ad proposita dubia. Defensio autem rei erit in scriptis exhibenda ad normam praesentis Instructionis. Videlicet singuli Antitites in Synodo Dioecesana audito clericorum consilio, quod tamen sequi non tenentur, quinque, vel ubi adjuncta rerum id fieri non sinant, tres saltem presbyteros ex probatissimis et, quantum fieri poterit, in jure canonico peritis seligant ad hujusmodi officium, ut in praedicta Instructione declaratum exstat, exercendum. Quod si ob aliquam gravem causam Synodus haberi nequeat, quinque vel tres, ut supra, ecclesiastici viri per Episcopum ad idem munus deputentur. Electi in officio manebunt usque ad proximam Dioecesanae Synodi celebrationem, in qua vel confirmentur, vel alii eorum loco designentur. Quod si interdum morte aut renuntiatione vel alia causa praescriptus consiliariorum numerus minuatur, episcopus audito consilio caeterorum ad commissionem pertinentium alios sufficiet. Porro commissio haec consultorum jurejurando obstricta tenetur ad officium fideliter adimplendum, et praeside Episcopo vel Vicario Generali rem suam aget."

152. The *Instruction*, in the present article, indicates what is to be done after the diocesan prosecutor has handed in his charge, as explained in the preceding article. We have seen, in the foregoing article, that the Ordinary, before beginning judicial proceedings, by ordering the prosecutor to make the charge, is obliged to ascertain extrajudicially, (*a*) the nature of the charges (*b*) and the *fundamentum delicti*, that is, the reliability of the sources whence they emanate.[1]

153. The information thus gathered—*v.g.*, from the witnesses and documents examined—is, as was seen, *extrajudicial*, and consequently, though sufficient to authorize the making of the official charge and the beginning of the trial.

[1] Instr., art. xv.

is yet *without any judicial force*, and therefore wholly inadequate to warrant the issuing of the citation to the accused. For, the judge cannot proceed to cite the accused for trial, unless he has at least *a judicial*,[1] not merely an extrajuridical, *half proof of guilt*. The reason is plain. A person who is cited as a defendant in a criminal cause, becomes thereby suspected of guilt among the people. Now, the very law of nature dictates that no one shall be thus treated without a sufficient cause—*i.e.*, without sufficient grounds for believing him guilty. See our *Elements*, Vol. II., n. 993, sq.

154. Consequently, when the Ordinary or judge conducts the trial *per viam inquisitionis*,[2] as he does according to the Instruction, in the sense already explained, he must, before he can issue the citation to the accused, examine *in a judicial* though summary manner, both the evidence which was collected extrajudicially by the Bishop or prosecutor, prior to the making of the official charge, and also all other relevant testimony which he may be able to gather. Thus he will verify or substantiate *judicially* what was already verified extrajudicially. We say *in a judicial though summary way;* hence the witnesses who are examined must be examined in the presence of a notary, who takes down the testimony, under oath, and in the manner laid down in the Instruction under articles xvii., xviii., xix., xx. This preliminary judicial investigation or trial is called *processus informativus or processus pro informatione Curiæ*, because it takes place *nondum constituto nec citato reo* and chiefly for the purpose of informing the Bishop's court whether there are

[1] We say, *at least;* for the judge should try to obtain all the proofs attainable—therefore full proof, if possible, before he cites the accused. Hence the *processus informativus* should be as thorough as possible.

[2] When the trial is *per viam accusationis*, no such informative proceedings are required. For it is the duty of the accuser, not of the judge, to see whether there is sufficient reason to proceed to the citation (our *Elements*, vol. ii , n. 994).

sufficient grounds, juridically speaking, for citing the accused.[1]

155. When the judge has thus juridically ascertained, through witnesses, or other authentic and legal sources of information, that there is at least a *probatio semi plena* of crime, he can issue the citation. When the accused appears, on citation, and has been fully informed of all the evidence collected against him, he has the full right to answer, that is, to defend himself. After the judge or auditor has admitted all the witnesses, documents, etc., produced by the defendant, he closes the trial and makes a synopsis of all the evidence submitted on both sides.

156. This whole procedure, namely, the *processus informativus*, the citation, the receiving of the defence, in a word, the whole trial, exclusive of the summing up by the prosecutor, and the defendant's advocate, and the final sentence, is called by the Instruction *compilatio processus*.[2] And justly so. For the word *compilatio* means the gathering together of various objects. Now it is evident, from what has been said, that the office of the judge, in the above proceedings, is to collect, arrange and prepare all the proofs for and against the accused, so that he may be able to pronounce a just sentence.

157. The Instruction enacts that in those dioceses of the United States, where the *curia* has been organized in the manner indicated by the *Instruction*, the *compilatio processus*, as above explained, may be committed to a worthy ecclesiastic learned in canon law, who shall always be assisted

[1] *The Third Plenary Council of Baltimore* (Nos. 299, 311) uses the phrase *processus informativus* to signify the *entire* trial, exclusive only of the final defence or summing up, as described in article xxxii. The *Council* therefore employs the phrase in a much wider sense than canonists, who generally use it to denote merely the special judicial inquiry that *precedes* the citation of the accused, as we explain above. However, it is merely a question of words, not of law.

[2] Cf. Pellegr., P. iv., Sect. xii, n. 41.

by a notary or secretary. In other words, the Bishop can authorize or delegate an ecclesiastic to make the *processus informativus*, summon the accused, hear and admit his entire defence, and close the case.

158. This official is called auditor, or *actorum redactor*, or also *investigating* judge, in contradistinction to the *deciding* judge who pronounces the decision or final sentence.[1] For the auditor, as we say in our *Elements*, Vol. II., n. 900, "has indeed, according to the *Instruction*, delegated jurisdiction so far as the hearing or taking cognizance of the cause is concerned, so that he can issue the citation to the accused, admit witnesses, proofs, etc., but he cannot pronounce final sentence." Hence it will be also observed that the office and functions of the auditor are similar to those exercised by the commissions of investigation according to the Instruction of July 20, 1878, and the subsequent authentic explanations of the Holy See. See our *Elements*, Vol. II., n. 901.

159. *Q.* Can the auditor be challenged as suspected, and what is the effect of such challenge?

A. We have seen, in our *Elements*, Vol. II., n. 1035, that a person who is otherwise perfectly competent may be challenged as suspected. We also show in our *Elements*, Vol. II., Nos. 904–908, 1042, that auditors, assessors, and commissions of investigation with us, may be objected to as suspected. Hence it is certain that the auditors of whom we speak may be challenged by the accused as suspected.[2] This is the common teaching of canonists, and is now placed beyond a shadow of doubt by the famous decision recently given by the S. C. C., Apr. 18, 1885. (See the Acta S. Sedis, Vol. XVIII., p. 56, sq., 1885.)

160. *Q.* How is the challenge to be made?

A. Before answering, we premise: When a person chal-

[1] Cf. Conc. Pl. Balt. iii., n. 323.

[2] Cap. *Super quæstionem* 27 (I. 29); Bouix, de Jud., vol. i., p. 461.

lenges an *ordinary* judge as suspected, he must *allege* and *prove* the motives on which the challenge is based.[1] If he does, the Ordinary thus challenged must withdraw from the case, on pain of nullity of the proceedings.[2] If he does not prove the challenge, the latter has no effect whatever.

161. We now answer: The auditor is but a *delegated* judge. Now, it is certain that a delegated judge, or an assessor,[3] or an auditor who is appointed *merely for a particular cause*, that is, to preside or assist at a *particular* trial only, and not at trials in general, can be challenged *peremptorily*, in the same manner as members of juries in our civil courts can be challenged. In other words, the accused can, in the case, challenge the auditor *without alleging or proving any cause whatever.*[4] The effect of this peremptory challenge is that the auditor, assessor or delegated judge thus challenged becomes at once *incompetent*, so that if he does not retire from the case, the whole proceedings are null and void.[5] This argument is clearly brought out in the case decided by the celebrated decree of the S. C. C. above mentioned.

162. But where the assessor, auditor or delegated judge is appointed *ad universitatem causarum*, that is, where he is appointed to try or assist at the trial of *any cause that may come up*, and not merely of this or that particular cause, he can be challenged only for cause; and consequently the person challenging must allege and prove the cause of the challenge, just as in the case of an ordinary judge.[6]

163. From this it will be seen that where the auditor, under the present Instruction, is appointed only to conduct a *particular trial*, he can be challenged as suspected, *without cause;* but where he is permanently appointed—*i.e.*, to con-

[1] Card. de Luca, lib. 15, de Jud., disc. 3, n. 63. [2] Ib., n. 71.
[3] Ib., disc. 4, n. 6, 7, 12, 14.
[4] Ib., disc. 3, n. 63; cf. Acta S. Sedis, vol. xviii., p. 58, an. 1885.
[5] Ib., n. 71. [6] Ib., n. 63.

duct all trials, he can be challenged only for cause. In like manner, where commissions of investigation still exist among us, by Papal dispensation, the members of these bodies can be challenged only for cause, at least, according to the letter of the law, since they are *permanently* appointed as assessors, and not merely for this or that particular trial. For fuller information on this head, see our *Elements*, Vol. II., 164. We say, *at least, according to the letter of the law;* for as Card. de Luca teaches, if the contrary custom prevails in a place, it should be followed. Thus, as a matter of fact, in the Roman Curia, ordinary, and delegated judges, auditors and assessors who are appointed "ad universitatem causarum" may be challenged peremptorily and without cause, just like delegated judges, auditors or assessors, appointed only for a particular case. In fact, in Rome, as Card. de Luca says, there is scarcely ever any occasion for challenging a judge, assessor or auditor, since the latter, even though he be a Cardinal, usually retires from the case, of his own accord, whenever there is any ground whatever for a challenge.

165. It will be observed that we state that *assessors* or *advisers* of the judge may be challenged as suspected in the same manner as the judge himself. This principle is held by canonists in general, and admits of no doubt. See Card. de Luca, de Jud., disc. 4, n. 5, 6, 11, 12, 13; Pellegrino, P. 2, Sect. I., Subs. 6, Inters. 4, n. 59, 60; Bouix, de Jud., Vol. I., p. 468, 469.

166. Consequently the *Pastor* seems to have fallen into an inadvertence when it asserts in its December number for 1885, p. 51: "David had objected to the assessor even as such. His objection was overruled by the S. C. C. on the ground that the *assessor was no judge*." For, as appears clearly from the *Acta S. Sedis*, Vol. XVI., p. 328–337, the S. C. C., in its decision of July 7, 1883, clearly admitted, on the one hand, David's right to challenge the assessor, and on

the other overruled David's challenge *because he had not shown that there were sufficient reasons for considering the assessor in the case as suspected.*

167. That this was the reason why the S. C. C. in the case overruled David's challenge, is evident from a simple statement of the facts. On the trial before the *curia* of *Milan*, in the first instance, David, the accused priest, objected to Joseph R., one of the assessors of the court, as suspected, on account of enmity. The *curia* of Milan overruled this objection; against this ruling David appealed to the S. C. C. His appeal was admitted and a stay of proceedings granted by the S. C. C. Having, upon examination, found that the alleged enmity of the assessor was not proven by David, the S. C. C. decided that the assessor need not be excluded from acting as such in the case. From this, then, it will be seen that the S. C. C. overruled David's objection or challenge, not on the ground that the assessor is no judge; but because David had failed to prove that there were any sufficient reasons for his challenge. For if the Sacred Congregation had been of opinion that it is unlawful to challenge an assessor, then it would not have admitted David's appeal at all.[1] In fact, according to the *Acta* S. Sedis, 1884, p. 328, sq., the principle that auditors, assessors, etc., can be challenged, was reaffirmed by the S. C. C., as lately as July 7, 1883, Decr. et Appell.

168. From what has been said, it will be seen that the duties of the auditor, or judicial commissioner, may be divided into those which *precede* and those which *follow* the citation of the accused.

169. I. *Duties of the auditor prior to the citation of the accused.*—Prior to the citation, he must, in a juridical manner, collect all the proofs and documents, etc., which go to show the guilt or innocence of the accused, in order that it may

[1] Acta S. Sedis, vol. xvi., p. 336.

appear juridically whether there is sufficient ground for the citation, and that the accused may not be able to accuse the *curia* of malicious prosecution or *calumnia*. This preliminary investigation, which canonists usually term *processus informativus, processus pro informatione curiæ*, should be as thorough as possible, as we explain in our *Elements*, Vol. II., n. 969, 983. Hence he should juridically, though summarily, examine documents, witnesses and all other evidence produced by the diocesan prosecutor or by other parties. In examining witnesses, etc., he must do so in the manner laid down in the *Instruction*, under articles xvii., xviii., xix., xx. In other words, he should cite the witnesses, examine them separately, one by one, under oath, and in the presence of the secretary or chancellor, who must take down the testimony.

170. However, this examination of witnesses, etc., taking place, as it does, in the absence of, and prior to the citation of the accused, *non constituto reo*, has not, of itself, such force of *legal proof* as will suffice for conviction, but is chiefly for the information of the court, to enable it to find out whether there is sufficient cause for citing the accused, and thus to avoid the danger of being accused of *calumnia* or malicious prosecution.

171. We say, *of itself;* for if *constituto reo*, that is, if the accused, after being cited, is duly informed of the examination and testimony of the witnesses, and then declares that he is satisfied with the examination-in-chief of the witnesses as made before his citation, and does not desire it to be repeated, then it obtains the same force as though it had been made after the citation and in the presence of the accused.

172. II. *Duties of the auditor after the citation of the accused.*—When the auditor has thus collected all the testimony which is available, he closes the *processus informativus*,[1] and issues the citation to the accused, provided he

[1] Instr., art. xxi.

finds there is at least a juridical half proof of guilt. After citing the accused, the auditor must communicate to him the accusations, unless this had been done already in the citation, and the proofs, etc., extant in the *curia* against him; admit his defence—*i.e.*, hear and examine the witnesses and other evidence adduced by him, as we state. In a word, he does what the commission of investigation is empowered to do, according to the Instruction of 1878. This is clear from articles xxii. to xxx. of the *Instruction.*

173. Should the accused contumaciously fail to appear before the auditor, on due citation, the latter will proceed in the manner laid down in article xxiv., as we shall explain below.

174. When the hearing or trial is over, the auditor writes out a report or synopsis of the proceedings and of the proofs submitted on both sides. This report plainly resembles the verdict or opinion given by the commission of investigation, according to n. 9 of the Instruction of 1878. The auditor, like a master in chancery in our civil courts, gives in his report to the court. Here his duties end.

175. *Appointment of the auditor.*—According to the general law of the Church, the Bishop is not, generally speaking, obliged to appoint an auditor for his court, as we show in our *Elements*, Vol. II., n. 902. The article under consideration likewise says that the "compilatio processus" *can*, not that it *should* be entrusted to an ecclesiastic as auditor. However, according to commentators on the Instruction of June 11, 1880, the phrase "committi *potest*" contains an implied recommendation that an auditor be appointed; that the judge (called auditor) conducting the trial shall be different from the judge giving the final sentence; that is, that the trial shall be conducted by one judge, and the final decision rendered by another. In fact, the auditor, acting, as he does, more or less in the capacity of inquisitor, is, by the very nature of his functions, easily accessible to prejudices.

Let us imagine ourselves in his place. He begins the investigation free from all bias. As a rule he will not immediately find full and conclusive proofs, whether of guilt or innocence. He will first discover indications of guilt. And he will gradually, though perhaps unconsciously, form in his mind an opinion as to the guilt or innocence of the accused, even before he has found sufficient proof of either. As he proceeds in his investigation, his preconceived opinion or prejudice may change, but it may also grow stronger and stronger, even though the proofs do not warrant it.

176. On the other hand, the *deciding* judge, when different from the *investigating* judge, has all the materials or proofs laid before him *at once*. He does not go in search of them. This fact constitutes a strong guarantee of his not prejudging the case and consequently of his impartiality and freedom from preconceived opinions. It is needless here to say that the office of auditor and *procurator fiscalis* cannot be discharged by one and the same person. The auditor acts as *judge;* the prosecutor as *accuser*.[1] Now it is evident that these two functions cannot be exercised by the same person. We have said that the auditor must be attended in all his proceedings by a *notary or secretary*, who shall write down and file all the acts, evidence, etc., as we explain in our *Elements*, Vol. II., n. 924. If the auditor or judge proceeds without the assistance of the secretary, the whole procedure is null and void. The secretary can be challenged as suspected, just like the auditor, assessor or judge himself.[2] It has been repeatedly decided by the Holy See that the *procurator fiscalis* cannot discharge the duties of the notary; that the two offices must be filled by two different persons.[3] Our *Elements*, Vol. II., n. 1146, sq.

177. *Commissions of Investigation.*—These are the functions

[1] Ct., art. xxxiii. and xxxv.; Droste, p. 48; our *Elements*, vol. ii., n. 912, sq.
[2] Droste, p. 42, 43. [3] Cf. S. C. EE., et RR., 7 Feb., 1677; Droste, p. 49.

of the auditor, in those dioceses where the Bishop's *curia* is organized in accordance with the *Instruction.* In those dioceses, however, where the Bishop's *curia* cannot as yet be established in the above manner, the Instruction of the S. C. de Prop. Fide, dated July 20, 1878, together with the subsequent authentic explanations of the same Congregation, and certain modifications laid down in the present *Instruction* (art. xii.), continues in full force, and is to be observed until the court can be organized in accordance with the present *Instruction.* In other words, where it is impossible to establish the *curia* in the manner indicated by the *Instruction*, and set forth in the *Third Plenary Council of Baltimore* (n. 299, sq.) and also in our *Elements*, Vol. II., n. 896, the *compilatio processus*, or the trial, though only from the citation of the accused to the final sentence exclusive, is conducted by the commission of investigation and not by the auditor. We say, *though only*, etc.; for the *processus informativus* proper that precedes the citation, seems not to be conducted by the commission, since this body is convened only after the citation has been already issued to the accused.

178. The mode of procedure of commissions of investigation is somewhat modified by the present *Instruction* (art. xii.). Thus formerly the members of the commission were not sworn; now they must take the oath to discharge their duties faithfully. Moreover, according to the Instruction of 1878, they were presided over by one of their own number; now they conduct their proceedings under the presidency of the Bishop or Vicar-general. Again, the summing up for the defence, as outlined in the Instruction of 1878, could be made orally or in writing; now it must be made in writing, in the manner laid down under articles xxx.–xxxiv. Apart from these alterations, the mode of procedure to be followed by commissions of investigation, where they still exist *ad interim*, by Papal dispensation, is the

same as that laid down in the Instruction of 1878, and the subsequent *Responsum ad Dubia*, and fully explained in the *second* volume of our *Elements*.

179. We have just said, *by Papal dispensation;* for the *Third Plenary Council of Baltimore* (n. 297 and n. 298), in accordance with the resolutions of the Roman Conferences held in 1883, enacts: "Statuimus ac omnino præscribimus ut in singulis Nostrarum Provinciarum diœcesibus curiæ Episcopales quamprimum constituantur vel saltem *ultra triennium* post Concilii promulgationem hæc curiarum constitutio non differatur sine S. Congr. de Prop. Fide dispensatione obtinenda pro diœcesibus in quibus intra hoc tempus id fieri nequeat."

180. Consequently Bishops are bound to establish the *curia*, as soon as possible, and at the latest, *within three years* after the promulgation of the *Third Plenary Council of Baltimore*. Where a Bishop cannot establish the curia within this period, he is obliged to have recourse to the S. Congr. de Prop. Fide and obtain permission to defer the establishment of the *curia;* where this permission has been obtained, the Instruction on Commissions of Investigation, dated July 20, 1878, together with the response of the Holy See, *ad Dubia*, as modified in article xii. of the present *Instruction*, must be observed *ad interim—i.e.*, until the curia can be and is established in accordance with the present *Instruction*. Thus the *Third Plenary Council of Baltimore* (n. 298) enacts: "Interim vero, quamdiu ex dispensatione S. Sedis curia in aliqua diœcesi constituta non est, illic observari debet Instructio de Commissione Investigationis 20 Julii, 1878, cum responsione subsequenti ad proposita dubia; necnon ea quæ hac de re in nuperrima Instructione S. Congregationis de Prop. Fide super clericorum causas disciplinares, articulo xii. notantur."

Art. XIII.

The Diocesan Prosecutor.

XIII. "In qualibet Curia Episcopali procurator fiscalis constituetur, ut justitiae et legi satisfiat."

181. We have just seen, that it is obligatory to establish the *curia* in every diocese, except where a dispensation is granted by the Holy See to continue the commission of investigation *ad interim*. The question now presents itself: what is here meant by the *Curia Episcopalis?* What is its *personnel?* By the Bishop's court (*Curia Episcopalis*) is here understood the body of persons who, either with the Bishop, or in his name, and by his authority, exercise contentious jurisdiction.[1] According to the *Instruction*, as explained by the *Third Plenary Council of Baltimore*, (n. 299, sq.) this curia is necessarily composed (*a*) of the Bishop or Vicar-general, or his delegate, as judge;[2] (*b*) of the chancellor of the diocese as secretary,[3] (*c*) and of the diocesan prosecutor, as plaintiff or accuser. To these the Bishop may, if he finds it expedient, add an auditor for the *processus compilatio;* special or additional notaries or secretaries; messengers.[4] This organization or *personnel* of the Bishop's court for the adjudication of criminal and disciplinary causes of ecclesiastics, is in accord with the prescription of the general law, as we show in our *Elements*, Vol. II., n. 896–927.

182. Observe, according to the *Third Plenary Council of Baltimore*, (n. 311) the chancellor of the diocese should act as the secretary. According to the general law of the Church, the chancellor of the diocese is not necessarily the secretary of the *curia;* the Bishop can appoint any other competent person to be the secretary. It seems probable, therefore, that when the *Third Plenary Council of Baltimore*

[1] Bouix, de Jud. vol. i., p. 343; Craisson, n. 5752. [2] Conc. Pl. Balt. iii., n. 300.
[3] Ib., n. 311. [4] Ib., n. 323.

(n. 311) says "Compilatio processus committi potest probo ac perito viro ecclesiastico, cui assistat actuarius, *qui sit cancellarius diœceseos*"—it simply *recommends* that the chancellor be made the secretary. The secretary, whether the chancellor of the diocese or any other person acts as such, can be challenged or objected to, as suspected.[1]

183. We have already, in this treatise, incidentally touched upon the duties of the judge, and of the chancellor or secretary. Moreover, we fully explain the functions of the judge in our *Elements*, Vol. II., n. 711, sq., and n. 897, sq.; and those of the secretary, ib., n. 918, sq. Here, then, it but remains to say a few words in regard to the *procurator fiscalis*. However, as we also speak at some length of this official, in our *Elements*, Vol. II., n. 912, sq., we shall here add only a few explanatory remarks.

184. The present article enacts that a diocesan prosecutor shall be appointed in every Episcopal Curia. This is in full harmony with the general law of the Church.[2] In fact, as in all criminal proceedings of the secular courts of the United States, the government or state is a party to the prosecution,[3] so likewise is the diocese or the diocesan government always a party to the prosecution in all criminal proceedings of the ecclesiastical courts. This is but proper. For it is the interest of the diocese that crime shall be punished. Hence the necessity of a special law officer to attend to the interests of the diocese and to conduct all criminal proceedings. So necessary is it that a diocesan prosecutor shall be appointed and be invited to intervene at the proceedings or trial, that the trial is otherwise null and void.[4] Cf. our *Elements*, Vol. II., n. 915.

185. *Rights and duties of the prosecutor.*—As we shall discuss

[1] S. C. C., 7 Julii, 1883; Acta S. Sedis, 1884, p. 328, sq.; Droste, p. 42.
[2] Our *Elements*, vol. ii., n. 915. [3] Walker, American Law, p. 114.
[4] C. Pl. Balt. iii., n. 325; Pellegr., P. iv., Sect. I., n. 18.

them incidentally in the course of this commentary, as occasion offers, we shall only touch upon them briefly in this article. It is the right and duty of the prosecutor to intervene at all judicial proceedings, whenever any step is to be taken against the accused. Consequently, he must, on pain of nullity, be cited to be present at the proceedings. The reason is, that being the official prosecutor, he takes the place of the *accuser*. Now the ecclesiastical judge should not take any step against the accused, except at the instance of the prosecutor or accuser. Otherwise, if he proceeded *proprio motu*, he would appear to act as judge and accuser at the same time. Since then, whatever steps are taken against the accused—*v.g.*, the informative process, the citation, etc., can be taken only at the demand of the prosecutor, it is plain that he must necessarily be present at all these proceedings, and, consequently, must also, on pain of the nullity of the proceedings, be notified to attend.[1] From this it follows that it is his right and duty to draw up and present the charges, and to ask that the trial be begun, that the preliminary inquiry or the *processus informativus* be instituted; to produce before the auditor, both before and after the citation, witnesses, documents, etc., to sustain the charges and the like.[2] (Conc. Pl. Balt. III., n. 301.) The *Acta S. Sedis*,[3] commenting on the Instruction of the S. C. EE. et RR. *Sacra hæc* of June 11, 1880, article xi., which is almost word for word the same as article xi. of the Instruction *Cum Magnopere*, says: "Articulus xi., ante omnia, quatuor exhibet modos processum instruendi; iique sunt: 1. ex officio; 2. in sequelam supplicis libelli; 3. in sequelam querelæ; 4. in sequelam notitiæ quæ alia quavis ratione ad curiam pervenerit. . . Processus ex notitia quæ alio quovis modo ad curiam

[1] Card. Kutschker, Eher., vol. v., p. 493.

[2] Pellegr., p. iv., sect. i., n. 18–20; Acta Eccl. Mediolan., vol. i., p. 22–85, 233–566.

[3] Vol. xv., p. 385

pervenerit, tum præsertim instituitur, *cum notorium est rei crimen, notorietate facti.* Verum quoniam hic etiam modus, persona eget quæ actoris seu accusatoris partes suscipiat ex officio, et persona nulla alia esse potest quam promotor fiscalis, cum primo, hoc est cum modo processum instruendi ex officio confunditur." The *Acta*, therefore, seems also to hold that even in *notorious* crimes, the trial laid down in the Instruction must be given to the accused.

186. Of course, the diocesan prosecutor can exercise the functions of his office *only in the curia for which he is appointed*, and not in any other curia. Outside of his own curia he has no status whatever as prosecutor. Consequently, when, for instance, an accused ecclesiastic, who is tried and condemned by the curia, appeals to the Metropolitan or Holy See, the prosecutor of the curia from which he appeals becomes simply the *appellee* in the court of the second or third instance, and has no status whatever *as prosecutor* in this curia. In fact, every Metropolitan court has a prosecutor of its own, who performs the duties of prosecutor *also in cases appealed to it.*

187. Likewise, in Rome, there is a procurator general attached to the S. C. EE. et RR., whose office is to act as prosecutor for, and to represent and defend the diocesan curia against which the appeal is interposed.[1] The other Sacred Congregations also have officials of their own to represent and defend the diocesan curia against which the appeal is lodged.

188. From this it follows that the functions of the diocesan prosecutor cease at once, so far as a particular case is concerned, as soon as the accused on trial is either condemned or absolved. Consequently, if, for instance, an ecclesiastic, condemned in the first instance, appeals to the Metropolitan or Holy See, and if the prosecutor of the *curia* of the first

[1] Decret. S. C. EE. et RR., 1835, art. x., xi

instance, presumes to appear in the rôle of a prosecutor in the curia to which the case has been appealed, the proceedings would be null and void, since the action of such prosecutor would be that of one who is not a *persona legitima standi in judicio*. For, according to article xiii. of the *Instruction*, each *curia* has its own prosecutor, who alone is qualified to perform the functions of prosecutor in his curia, even in cases of appeal.

189. This principle of law was admirably brought out and fully confirmed in the oft-quoted *causa Mediolan. fractionis jejunii*, decided by the Holy See, April 18, 1885. The prosecutor of the *curia* of Milan had, it seems, attempted to arrogate to himself the rôle of prosecutor before the S. C. C., to whom the case had been appealed from Milan. The Roman advocate of David, the appellant, however, promptly and cleverly pointed out the arrogance of this rôle, and contended that in consequence the proceedings were invalid. The decision of the Sacred Congregation of Council sustained this view, according to the *Acta S. Sedis*.[1]

190. In this celebrated case, which is of the greatest practical consequence, also for us, the principle was clearly and unequivocally established, as the *Acta S. Sedis* teaches, that whatever is done in violation of the *forms of trial*, as laid down in the *Instruction* of June 11, 1880, *is null and void*, even though the Instruction nowhere expressly decrees that the violation shall nullify the proceedings. For, as the Roman advocate of the priest David A., the appellant, well argued, it is a general principle or axiom of law that whatever is done against the law is, *not merely illicit*, but also *null and void*, even though the law does not expressly so declare. This axiom is expressly laid down in the Roman law, enacted by the emperors Theodosius and Valentinian,[2] and is fully adopted by the Church, in the *regula*

[1] Acta S. Sedis, vol. xviii., pp. 73–75. [2] L. 5, C. de Leg. (I. 14.)

64, de reg. jur. in 6, which says: "Quæ autem contra jus fiunt, debent utique *pro infectis haberi*."[1]

191. The reason is that the forms of procedure prescribed by the law are intended by the law to serve *as the necessary means* for finding out the truth and thus rendering justice to the parties. Hence these forms and rules pertain to the *very substance* of justice itself.[2] Consequently a violation of these *forms* of justice and law not unfrequently inflicts greater injury than the violation of *justice and law itself*, as was ably argued by the Roman advocate of David, the appellant in the case, and is also observed by the editors of the Acta S. Sedis, Vol. XVIII., p. 74.

192. We have said that according to the *Acta S. Sedis*, this axiom of law has been confirmed in the above decision of the Holy See, and applied to the form of trial, as outlined in the Instruction of 1880. For, the trial of this case, which took place in the curia of Milan, acting as the curia of the first instance, was conducted under the rule laid down in the Instruction of the S. C. EE. et RR., dated June 11, 1880, of which our *Instruction* is almost an exact copy. Consequently, the above decision of the S. C. C., and the inferences drawn from it by the *Acta S. Sedis*, are of the greatest practical importance also for this country.

193. *Appointment and removal of the prosecutor.*—He is appointed *ad beneplacitum*.[3] Consequently he is removable indeed without a cause specified in canon law, and without a formal trial, though not without a grave and sufficient cause. He is entitled to a salary from the Bishop, even though no agreement to that effect was made beforehand.[4]

194. It is needless here to add that the prosecutor cannot act as secretary, nor, inversely, the secretary as prosecutor;

[1] Cf. Acta S. Sedis, vol. xviii., p. 61. [2] Ib., p. 59.

[3] For the formula of appointment, see Bouix, de Jud., vol. ii., p. 482.

[4] Bouix, de Jud., vol. ii., p. 475.

neither can the prosecutor act as, or perform the functions of the auditor. These three officials must be distinct persons, since their offices are such as cannot be united in one and the same person. See our *Elements*, Vol. II., n. 914.

Art. XIV.

Mode of Serving Judicial Notices and Citations.

XIV. "Pro intimationibus et notificationibus, si apparitores curiæ desint, utatur episcopus persona aliqua qualificata quæ eas exhibeat, ac de hoc ipsum certiorem reddat: vel etiam a curia per publicos tabellarios commendatæ (quibus locis hoc systema viget) transmittantur, exquisita fide exhibitionis atque acceptionis vel repudii. Intimationes et notificationes semper in scriptis absolute fiant."

195. Once the judicial proceedings have begun, as explained under article xi., it will become necessary for the auditor or judge conducting the *compilatio processus* to cite witnesses, and the accused, and to send other notices to the parties. The present article provides for the proper serving or delivery of these notices and citations. It establishes three ways of serving or executing them: *first*, by official messengers of the *curia; second*, by any trustworthy or suitable person, in case there are no official messengers attached to the curia;[1] *third*, by registered mail, where this postal system exists. Any of these three modes can be adopted in the United States. The main object of these provisions is to obtain a reliable proof of the delivery of the citation of notices. When the notice or citation is served on the party by the official messenger or any other suitable person, the latter shall inform the curia—*i.e.*, the auditor or judge—that he did serve the notice; and such affirmation or statement, taken down by the notary and

[1] Thus it will be seen that in ecclesiastical trials, citations and notices may be delivered not merely by *official* messengers, but also by *private* persons. (Pierantonelli, Praxis, p. 128.)

filed among the acts, shall constitute full proof of the service. When the delivery is by registered mail, the receipt or refusal of the letter on the part of the person to whom it is addressed, which is returned by the Post Office to the sender, is full proof of the execution or delivery of the notice.

196. When a messenger or person is employed to deliver these notices, the auditor of the "Prælectiones S. Sulpitii" advises that only ecclesiastics be made use of,[1] as far as possible, in order that many things which effect the dignity and honor of ecclesiastics and the ecclesiastical state, may thus be kept from the laity. For further information regarding official messengers, see our *Elements*, Vol. II., n. 926. Concerning the delivery of citations, see our *Elements*, Vol. II., n. 1007.

197. The *Instructio* adds in the article under discussion: "Intimationes et notificationes *semper in scriptis absolute fiant.*" Consequently the proceeding will be *null and void*, unless the notices and citation are made *in writing*. This seems to apply not merely to citations and notices directed to the accused, but also to those addressed to witnesses and others who appear in the proceedings. For, the above paragraph speaks of notices in general, and not merely of notices to the accused.

Art. XV.

Groundwork or Basis of the Prosecutor's Charges.

XV. "Delicti fundamentum erui potest ex ipsa expositione habita in processu, quæ authenticis informationibus vel confessione extrajudiciali, vel testium depositionibus confirmetur: transgressio vero præcepti ex ipso decreto et actu intimationis ad normam art. vii. et viii. factæ. deducitur."

198. We have seen, under article xi., that the first step of the trial or special judicial inquiry instituted *ex officio* is

[1] Vol. iii., pp. 9, 10.

the preferring of the charge by the fiscal prosecutor. It has also been shown that in this official charge or indictment, the diocesan prosecutor must state clearly and specifically (*a*) the nature of the offence charged: its chief or substantial details; the time and place of its commission; (*b*) as a rule, also that the accused was duly warned according to article vi. of the Instruction; (*c*) and also given the formal precept, according to articles vii. and viii. of the Instruction; (*d*) and that he spurned the warnings and precept and is consequently incorrigible.

199. Now, how is he to obtain this information, or these particulars which form the foundation or groundwork of his charge (*fundamentum delicti*)? The present article of the Instruction answers that the details in question, so far as they relate to the *crime itself*, can be obtained from the extrajudicial statement of the facts or alleged offence received by the Bishop or fiscal prosecutor when the offence was first brought to his notice, whether by complaints, accusations or otherwise, as explained under article xi., or also from the *summaria facti cognitio* which precedes the imposing of preventive remedies; that, however, this statement of the alleged facts must always be corroborated extrajudicially (*a*) by authentic informations gathered by the Bishop or fiscal prosecutor, (*b*) or by the extrajudicial confession of the accused, (*c*) or by the depositions, even though extrajudicial, of witnesses.

200. The *Instruction* furthermore answers that the details relating to the *giving of the precept*—namely, the date and manner of its having been given—its tenor, etc., can be obtained by the prosecutor from the authentic copy of the precept or decree itself, and the minutes showing when and how it was given, extant in the episcopal archives. The particulars as to the *violation of the precept*, on the part of the accused, the prosecutor will obtain in the same manner as in the case of the main offence, namely, by authentic infor-

mations, or by the extrajudicial confession of the accused, or by the extrajudicial testimony of witnesses. We have said, *extrajudicially;* for the *first step* of judicial proceedings, is the presenting of the charge by the prosecutor. Consequently all the steps which precede it can be and are done in an extrajudicial manner.

201. The meaning, then, of this article (xv.) is: 1. That the prosecutor, whose duty it is to prefer the charge, must base his *libellus* or official charge on information received either by himself or by the Bishop—*v.g.*, already in the *summaria facti cognitio* (art. v.), and corroborated, even though extrajudicially, by inquiries from authentic sources, etc. 2. That before the prosecutor draws up and presents the charge, he, or the Bishop ordering him to prefer the charge, must extrajudicially ascertain—*v.g.*, by examining witnesses, documents, letters, or making other inquiries in authentic quarters: (*a*) what the alleged offence or *corpus delicti* is, and whether it is one that is punishable according to the sacred canons, otherwise it may be found at the end of the trial that although it was true and proven, yet the offence is not punishable; (*b*) whether there are sufficient grounds for the charge. For if the prosecutor prefers the charge without having a solid foundation, or good reasons for believing the accused guilty, the latter would have the right to appeal to the Metropolitan or Holy See.[1]

202. If it is found, upon the conclusion of this extrajudicial investigation, that there are good reasons for believing the accused guilty of the charge, and that there is consequently a *fundamentum delicti*, the prosecutor draws up and presents the official charges; otherwise, the charges should be dropped. These rules are just. For the law of nature itself dictates that such grave and official and public imputations or accusations, as the charges of the prosecutor,

[1] Droste, p. 110.

shall not be made against any one, especially an ecclesiastic, except when they are based on solid reasons.

203. The prescriptions of the article (XV.) are similar to those which obtain also in the secular courts of the United States. Thus, in our secular courts, the formal charges or true bill, or indictment, is presented by the grand jury in all criminal causes. Now, as Walker says;[1] *the rule is that they* (the grand jury) *ought not to find a bill or indictment unless the evidence be such as, if uncontradicted, would induce them on the trial to convict.*

Art. XVI.

What Kind of Proof is Required for the Citation and Eventual Conviction and Condemnation of the Accused?

XVI. "Ad admittendam vero rei culpabilitatem, necessaria est probatio legalis quae iis momentis constare debet, quibus veritas vere demonstrata elucescat, vel saltem moralis convictio inducatur quocunque rationabili dubio oppositi remoto."

204. The previous article defines, as we have seen, what kind of proof of guilt must be on hand before the prosecutor can draw up and present the charges. The present article goes a step farther and shows what sort of proof is required, in order that the judge or auditor, after receiving the prosecutor's charges, may be able to issue the citation to the accused, or at the end of the trial pass sentence of condemnation upon him.

205. When the prosecutor has presented the charges, the Bishop, or auditor delegated by the Bishop to conduct the *compilatio processus*, cannot forthwith proceed to cite the accused for trial. He must first institute a *juridical* inquiry or investigation into the charges presented by the prosecutor, in order to find out whether they are based

[1] Walker, Am. Law, p. 715.

upon *probatio legalis*.[1] This is the meaning of the present article of the *Instruction*. This preliminary judicial inquiry is called *processus informativus*, and is always necessary prior to the citation of the accused,[2] as is plainly indicated by articles xvi. and xxi. of the *Instructio*, and also by the *Third Plenary Council of Baltimore*, n. 311, 312.

206. This is but just. For to summon him to appear before the judge, in order to answer to the charges preferred against him by the prosecutor, is tantamount to assuming juridically that the accused is *prima facie* guilty of the charges. Hence to summon the accused without having ascertained whether the charges are based upon legal proof, would be to assume him *prima facie* guilty of the charges, and thus to disgrace him without a sufficient cause, and would therefore render the *curia* liable to *calumnia* or false prosecution, and to damages for such false prosecution.[3] Consequently the present article very properly prescribes, that in order to cite the accused and thus assume him guilty,—legal proof is necessary. The words are: "Ad admittendam vero rei culpabilitatem, necessaria est probatio legalis."

207. We have said that this *processus informativus* is a *juridical* investigation. In order to understand this better, it is necessary to distinguish between the preliminary investigation (*a*) which precedes the imposing of the preventive remedies, or also the presenting of the prosecutor's charge, (*b*) and that which follows the *libellus* or charge of the prosecutor, but yet precedes the citation of the accused. The latter is judicial, the former extrajudicial. Now the extrajudicial investigation, while sufficient to enable the Bishop to impose preventive or *paternal* remedies, and if these prove of no avail, to order the prosecutor to prefer official charges, and thus take the first step in criminal

[1] Conc. Plen. Balt. iii. n. 311.

[2] Reiff., l. 5, t. i., n. 361, 403; Bouix, de Jud. l. c., p. 153. [3] Instr. art. xliv.

proceedings, is not sufficient to warrant the judge to issue the citation to the accused, and thus to assume him *prima facie* guilty, as we have already shown.

208. Here the question presents itself: What is meant by *probatio legalis?* By a proof (*probatio*) in general, is understood any legitimate means or argument, by which the existence or truth of some controverted fact or thing is shown. Proofs are of two kinds: judicial and extrajudicial. A judicial proof (*probatio judicialis*)—and we speak here of judicial proofs only—is any legitimate means or argument, by which the truth of a disputed or doubtful fact is demonstrated before the judge.[1]

209. Let us briefly explain this definition. We say first, *means or arguments.* These terms are taken in a broad sense, and mean witnesses, documents, etc. We say, *legitimate;* that is, the proof, in order to have any force in judicial proceedings, must be such as the law prescribes. In other words, it must (*a*) be one of those arguments which the law sanctions and admits as proof; (*b*) it must have all the requirements and formalities prescribed by law. If it lacks any of these conditions, it is not legitimate or legal proof, and is of no force in judicial proceedings.

210. Here, then, two questions present themselves: *First*, What are the various legal proofs or *probationes legales?* *Second*, What are the requirements and formalities prescribed by law for legal proof? In answer to the first question, we observe that in order to avoid uncertainty and confusion, the law itself determines what shall be competent proofs in judicial proceedings.[1] What are they? They are of two kinds: perfect or full, and imperfect or half-full. What are, according to the sacred canons, perfect proofs? See our

[1] Schmalzg, l. c., t. 19, n. 2; Bouix, de Jud., vol. i., p. 302; Santi, l. c., t. 19, n. 1; Sanguineti, n. 594; Grandeclaude, l. c., t. 19, vol. ii., p. 102.

[2] Sanguineti, l. c., 587, c.; Santi, l. c., l 2, t. 19, n. 3.

Elements, Vol. II., n. 815. What are, according to ecclesiastical law, imperfect proofs? See our *Elements*, Vol. II., n. 816.

211. Our answer to the second question is that, speaking in general, the Law of the Church determines not only what means or arguments shall constitute legal proofs, as we have just seen, but also what qualifications they should possess and in what form or manner they must be produced.[1] Thus the Law of the Church enacts that the testimony of two competent witnesses shall, as a rule, constitute full proof in judicial proceedings. It says, moreover, what is required in order that a witness may be competent. It establishes, moreover, the *form* or *manner* in which he must give his testimony, namely, separately, under oath, before the judge and a notary.

212. Speaking in particular, the following are the chief conditions or qualifications or formalities which the law requires or prescribes for all juridical proofs: 1. A judicial proof must be made before the judge and a notary whose duty is to write it down. If no notary is present, the proof is not legal or juridical, and will consequently have no effect in judicial proceedings.[2] 2. It must be *clear* and *determinate*, not vague or obscure. 3. It must be *conformis libello*, or to the point; that is, it must have reference to the charge as set forth in the prosecutor's official charge. In other words, it must either prove or disprove the charges, as contained in the prosecutor's indictment; otherwise it will have no effect. For only those things are to be proved or disproved which have been properly brought before the judge (or which are in court), or which are being tried in court. Hence other proofs, not referring to the charges made, are to be rejected as vain and superfluous.[3]

[1] Sanguineti, l. c., n. 598, c.; Santi., l. c., n. 1.; Grandeclaude, vol. ii., p. 103, b.

[2] Sanguineti, l. c., p. 422.

[3] Santi, l. c., 5.

4. It must be made in judicio—*i. e.*, during the trial—*i. e.*, after the *litis cont.* and in the presence, real or verbal, of the adversary. This rule, however, admits of exceptions. Thus in trials, per *viam inquisitionis*, as is ours, the proofs can be submitted before the citation of the accused and the *litis contestatio.* But in this case they will have indeed the effect to authorize the *curia* to proceed to the citation; but they will not have the force of legal proof to authorize the conviction of the accused, unless they have been legitimized as we shall explain.[1]

213. These conditions are required in all legal proofs and are therefore *common* to all. Besides these formalities, which *all* proofs must have, the law also lays down the *special* conditions which are *peculiar* to each kind of proof in particular. Thus it enacts, in regard to witnesses, (*a*) that they shall be heard separately, (*b*) under oath, etc.

214. Hence the law determines (1) the *qualifications* of each kind of proof; thus it enacts, in regard to witnesses, (*a*) that two unexceptionable witnesses are required; (*b*) that witnesses are unobjectionable, when they have none of the defects or disqualifications pointed out in law; (*c*) that their testimony must agree, etc.; (2) the *form* peculiar to each kind of proof—*i.e.*, the *manner* in which each kind of proof must be made. Thus, in regard to witnesses, it says: they shall be heard (*a*) separately, (*b*) under oath, (*c*) by the judge himself or his delegate, (*d*) in the presence of a notary who shall write out the testimony. All these conditions and formalities are fully given and explained in our *Elements*, Vol. II., n. 824, sq.

215. The *Instruction* requires not only *probatio legalis*, but also *probatio plena*, that is, such legal proof, *quæ iis momentis constare debet, quibus veritas vere demonstrata elucescat, vel saltem moralis convictio inducatur quocunque rationabili dubio oppositi*

[1] Grandeclaude, l. c., 103; Sanguineti, l. c., 421, 422.

remoto. This is also the teaching of canonists. See our *Elements*, Vol. II., n. 817, 818, 880.

216. Only when the judge or auditor, at the conclusion of the *processus informativus*, finds there is a *prima facie* full and legal proof of guilt, that is, such proof as, if not overthrown by the accused afterwards, will suffice for his conviction, can he cite the accused for trial; otherwise he cannot; and if he does nevertheless cite him, he renders himself liable to *calumnia* or false prosecution.[1]

217. We have said that for conviction in criminal and disciplinary causes *full proof* (*probatio plena, probatio legalis*) of guilt is required. We also show, in our *Elements*, Vol. II., n. 833, sq., that as a rule, *two* witnesses, who are above all objection, constitute full proof also in criminal causes. This is the rule; for there are several cases where *more than two witnesses* are required for conviction. Thus, according to the sacred canons, more than two or even three witnesses are necessary, in criminal and disciplinary causes, for the conviction and condemnation of *priests and other ecclesiastics.*[2]

218. The reason is that the stronger the presumption is in favor of a person, the greater must be the proofs of guilt, before he can be punished. Now ecclesiastics are strongly presumed by ecclesiastical law to be of good morals and to lead exemplary lives. Another reason is that, as Pope Innocent III., in the *Cap.* 24, *de acc.*, says: "Pastors of churches, and ecclesiastics in general, can, in the legitimate discharge of their duties, easily offend ill-disposed people, and thus it will not be difficult to find a number of such persons who will readily testify against rectors and other ecclesiastics from motives of revenge or ill-will."

219. Hence, also, *laics* are not, as a rule, competent wit-

[1] Reiff., l. 5, t. i., n. 361, 362. Bouix, de Jud., vol. ii., pp. 155, 536, sq.

[2] Can. 1. 2, C. 2, Q. iv, vi.; S. Alph., l. 5, Cap. 3, n. 259.

[3] Fr. Sancti, Prælectiones Jur. Can., lib. 2, t. 20, n. 17. —Romæ, 1886.

nesses against ecclesiastics, in criminal and disciplinary causes, as we show in our *Elements*, Vol. II., n. 828.

220. These principles of ecclesiastical law are well brought out by the *Acta S. Sedis*, and applied to trials conducted in accordance with the Instruction of the S. C. EE. et RR. of 1880, in the above case of the priest David A. against the Curia of Milan, decided by the S. C. C., April 18, 1885.[1]

221. *Lay persons* cannot, as we have just said, be witnesses against priests and other ecclesiastics, in criminal and disciplinary causes,[2] also as tried at present in this country, according to the Instruction *Cum Magnopere*, now under discussion.[3] This law was made partly on account of the great respect which laics owe ecclesiastics, who are *ambassadors for Christ*,[4] *the ministers of Christ, and the dispensers of the mysteries of God* on earth,[5] the *fathers* and *teachers* of the faithful.[6] See also our *Elements*, Vol. II., n. 828.

222. Nor can it be objected that laics may accuse, denounce or lodge judicial complaints before the Bishop against ecclesiastics, and that consequently they are also competent to act as witnesses against them. The objection does not hold. For the effect of a complaint or denunciation is to enable the Bishop to *begin* the judicial inquiry, whereas the effect of the testimony of witnesses is to authorize him to *condemn* the accused.[7] We have said, *in criminal and disciplinary causes;* since lay persons are competent witnesses against ecclesiastics *in civil causes* pertaining to the ecclesiastical forum.[8]

223. We have, moreover, said, *also as tried at present in our country, according to the Instruction Cum Magnopere. The Acta S. Sedis* contends that the principle in question was

[1] See Acta S. Sedis, vol. xviii., p. 63.
[2] Cap. 14, de test. (II., 20).
[3] Our *Elements*, vol. ii., n. 828.
[4] II. Cor. v. 20.
[5] I. Cor. iv. 1.
[6] Can. 9, 10, dist. 96.
[7] Schmalzg., l. 2, t. 20, n. 49.
[8] Cap. 33, de test.; Schmalzg., l. c.

clearly brought out and confirmed in the above celebrated case of the Priest David versus the Curia of Milan, decided by the S. C. C., April 18, 1885. The trial of this case, which took place in the curia of Milan, was conducted according to the Instruction of the S. C. EE. et RR., dated June 11, 1880, of which the Instr. *Cum Magnopere* is a copy. Lay witnesses were allowed to testify against David at this trial. The Roman advocate contended that the trial was null and void on that account. According to *the Acta S. Sedis* the decision of the S. C. C. sustained this view. As the Instruction *Cum Magnopere* is the same as that of 1880, the inferences and deductions of *the Acta S. Sedis* apply, of course, also to our *Instruction.* In fact, the law of the Church, as still in force, is that lay people are not competent witnesses against ecclesiastics in any judicial proceeding or trial, where there is question of inflicting a censure, punishment, or grave disciplinary correction upon an ecclesiastic. This holds true, no matter whether the proceedings are *per viam accusationis* or *inquisitionis*, and therefore applies also to our trials conducted according to the present *Instruction.* From this it will be seen that when we say in our *Elements*, Vol. II., n. 828, that laics can testify against ecclesiastics, in case the proceedings are *per viam inquisitionis*, we do not refer to the case where a regular ecclesiastical punishment, or censure, or grave disciplinary correction is to be inflicted, but only to cases where a *slight punishment*, or a *mere paternal and preventive remedy* is to be imposed.

224. The above rule that laics cannot be witnesses against ecclesiastics, however, has some exceptions, as we show in our *Elements of Ecclesiastical Law*, Vol. II., n. 828. Thus laics[1] can testify against ecclesiastics, also in criminal

[1] Provided they are above the age of *twenty;* for nobody can testify in a criminal cause who is under that age.—Our *Elements*, vol. ii., n. 829.

causes, (*a*) where the interests of such laymen are involved. Thus parishioners can bear testimony against their parish priest, because it is to their interest and spiritual welfare to have a good rector.[1] (*b*) Where, owing to time, place and circumstances, ecclesiastics cannot be had as witnesses. But even in this case, before laics can be admitted as witnesses, it is necessary to *prove*, not merely that, as a matter of fact, there were no ecclesiastics actually present when the crime was committed, but also that none *could* have been present—*v.g.*, because the accused ecclesiastic lives and committed the alleged offence in a solitary place, or in a remote country village, where there are no other ecclesiastics besides himself. This argument is ably developed by the Roman advocate of the appellant, David A., in the case decided by the S. C. C., April 18, 1885.[2]

225. Finally, even in these exceptional cases, where laics may be admitted as witnesses against ecclesiastics, they are not regarded as witnesses who are above all objection (*testes omni exceptione majores*) and consequently, no matter how numerous, will not suffice for conviction, unless their testimony is corroborated by a competent witness who is an ecclesiastic of good fame, or by other legal evidence.[3]

226. While laics cannot be witnesses *against* ecclesiastics, they are fully competent, by the law of the Church, to be witnesses *for* them. In other words, not only *laymen* but also *women* are competent witnesses for the *defence*, and to prove the innocence of an accused ecclesiastic.[4]

[1] Schmalzg., l. c., n. 50.
[2] Acta S. Sedis, l. c., p. 64.
[3] Schmalzg., l. c., n. 50.
[4] Ib., l. c., n. 52.

Art. XVII.

How the Witnesses are Examined "Pro Informatione Curiæ," Before the Citation.

XVII. "Personae quae examini subjiciendae sunt, separatim audiuntur."

227. We have seen, under articles xii. and xv., that before the auditor can cite the accused, he must institute a *processus informativus*, and thus gather, in a judicial manner, all possible information, examine witnesses, etc. In fact, in nearly all cases, he will be obliged to obtain his information or proofs by hearing and questioning competent witnesses. How, then, does he examine the witnesses in the case? The Instruction distinctly says that the witnesses shall be examined separately, that is, one by one, apart from each other, and not in each other's hearing. The chief object of this is to prevent collusion. They must, moreover, be examined under oath, as we shall see in the following article. See our *Elements*, Vol. II., n. 839.

228. We remark that the auditor or ecclesiastical judge, or the diocesan prosecutor, must carefully avoid asking the witnesses any leading question (*quæstio suggestiva*), as we show in our *Elements of Ecclesiastical Law*, Vol. II., n. 847. Such questions are strongly reprobated and strictly prohibited by the law of the Church.[1] For, such questions easily cause the witness to assent to the suggestion made in the question and to give the answer which is suggested, and of which he never dreamt before, rather than his own statement, for fear of otherwise displeasing the auditor or judge. Thus he will be led into making false statements.[2] Hence, if a leading question is put to a witness, his deposition is *ipso jure* null and void.[3]

[1] L. 1, § 21, qui quæstionem, ff. de quæst. (48, 18). [2] Reiff., l. 2, t. 20, n. 516.
[3] Reg. 64, jur., in 6°; Leur. For. Ecc., l ii., t. 20, qu. 651.

229. The same rule obtains also in our secular courts. Thus Hilliard, in his *Summary of American Civil Jurisprudence*, p. 305, writes: "In the examination of a witness, *leading questions* are not allowed—that is, questions which suggest to him the answer he is to make, or questions to which the simple reply of "yes" or "no" would be sufficient. Violations of this rule, however, are sometimes necessary, in order to *direct the witness' attention* to the particular subject of inquiry. And less strictness is required when he shows an evident disposition to conceal the truth or favor the other party." This author, then, points out when leading questions may be asked on cross-examination. His words are: "After the examination-in-chief, or even after the witness has been sworn but not examined, the adverse party has the privilege of *cross-examining*. And he may propose *leading questions*."

230. This is also taught by Walker, in *American Law*, p. 633, as follows: "The party who calls him (witness) first examines him. And this is called the *examination-in-chief*. During this examination, no *leading questions* can be asked; that is, no questions so framed as to indicate the answer desired. But the witness may refresh his memory as to names and dates by consulting his own memoranda. The *cross-examination* by the adversary may be by leading questions, and as searching and particular as he pleases; for this is often the only way to detect a false witness. But cross-examination applies only to the matter brought out in chief. As to any new matter, the party makes the witness his own, and becomes an examiner-in-chief. When this examination is closed, the examiner-in-chief may cross-examine as to any new matter brought out on the other side. But he can bring out no new matter himself, because this might make the alternation endless."

231. What has been said as to questions put to witnesses holds true, also, of questions put to the *accused himself* in re-

gard to crime imputed to him.[1] Consequently, the auditor or judge, or the diocesan prosecutor, can never, in a criminal trial, when examining the accused, put any leading question to him. If, nevertheless, the accused is asked leading questions, and is thereby led into confessing his guilt, this confession has no effect and does not suffice for his condemnation; nay, the entire proceedings are *ipso jure* null and void.[2]

232. This whole teaching is fully brought out by the Roman advocate in the case decided by the Holy See, and quoted already several times by us.[3] In this case, which was appealed from the Archdiocese of Milan, acting as the court of the first instance, to the S. C. C., the Roman advocate employed by the appellant, the Rev. David A., pointed out to the S. C. C. that his client had, in the *curia* of Milan, been asked leading questions, and that these questions had been of such a captious nature that, no matter what way his client answered, he would criminate himself; that the witnesses against the accused had, in like manner, been asked leading or suggestive questions. From this the advocate argued that the entire proceedings were null and void. The *Acta S. Sedis* infers that the Sacred Congregation sustained these views by the fact that it reversed the sentence of the *curia* of Milan, and thus gave its decision in favor of the accused.[4]

233. *Can a person who bears but a "slight enmity" against the accused be a witness against him in a criminal cause?* In our *Elements*, Vol. II., n. 828, we show that one who is an *enemy of, or ill-disposed against* the accused, cannot testify against him. For such a person is easily led by his feelings to make false statements, in order to avenge himself on and injure the one against whom he bears the enmity or ill-will.

[1] See our Elements, vol. ii., n. 847.

[2] Reg. 64, Jur. in 6°; Leur., l. c.; Reiff., l. c., n. 520, 521.

[3] See above, article xi. [4] Acta S. Sedis, vol. xviii., p. 65, 1885.

Hence, the law of the Church presumes his testimony to be false.[1] In *civil causes*, the enmity must, as a rule, be of a *grave character* (*inimicitia gravis*) in order to incapacitate or exclude a witness. But in *criminal causes*,—namely, where a punishment is to be inflicted—*slight enmity* (*inimicitia levis*) unfits the witness to testify, so that if he is, nevertheless, allowed to testify, his testimony *is of no value*.[2] According to the *Acta S. Sedis*, this teaching is distinctly brought out, confirmed and applied to trials as conducted in accordance with the Instruction of June 11, 1880 (and, therefore, also of 1884), in the case, already quoted several times, of the priest David, decided by the Holy See, April 18, 1885.[3]

234. Another remark is that the persons *who make the complaint, accusation, or denunciation* to the Bishop or ecclesiastical judge cannot be witnesses on the criminal trial which is instituted on occasion of their complaint in order to inflict punishment upon the person complained of.[4] This principle is also, according to the *Acta S. Sedis*, well brought out and confirmed in the above case of the priest David.[5] The reason is that nobody can be at the same time an accuser or complainant and a witness. Moreover, such persons are regarded as showing a desire to have the person punished against whom they lodge the complaint, and as volunteering their testimony against him. Now, persons of this kind are inadmissible as witnesses, as we show in our *Elements*, Vol. II., n. 836. Finally, one who lodges a complaint is put on the same footing with an accuser (*accusator*) or plaintiff (*actor*). Now a plaintiff should prove his accusation not by his own testimony (for that would be giving testimony in his own cause), but by the testimony of others.[6]

235. Here it should be observed that the testimony of the

[1] Can. si testes, §. testium fides, c. 4, q. 3; Reiff., l. 2., t. 20, n. 132.
[2] Ib., l. c., n. 136.
[3] Acta S. Sedis, vol. xviii, p. 65.
[4] Schmalzg., l. 2, t. 20, n. 64.
[5] Acta S. Sedis, vol. xviii., p. 65.
[6] Leur., For. Eccl., l. 2, t. 20, qu. 585.

witnesses, even though there are more than a thousand, thus examined by the auditor or judge, in the *processus informativus*, prior to the citation of the accused, and, therefore, in his absence, or as the technical phrase is, *nondum citato et constituto reo*, is simply regarded as information which may authorize the curia to issue the citation, but can never, of itself, have the force of legal or canonical proof sufficient for conviction or condemnation. For the law of the Church enacts, as we have seen, that the testimony or evidence which is submitted, has legal force only when it is produced before the ecclesiastical judge, after the *litis contestatio*, and therefore after the citation of the accused, and in his presence.

236. Consequently, while, according to the universal practice of ecclesiastical courts, the witnesses for the information of the curia—*pro informatione curiæ*—are admitted and examined, as soon as the charge has been handed in by the diocesan prosecutor, and that, *non citata parte*, that is, before the accused is cited, and, therefore, in his absence,[1] yet their deposition will not have the force of legal proof, at least of itself. We say, *at least of itself;* that is, unless it is ratified or accepted by the accused. Hence, if the accused, after being cited, refuses to declare that he considers the witnesses, who were examined prior to his citation, in the *processus informativus*, properly and lawfully examined, it will become necessary to repeat their examination after the citation of the accused, that is, *citata parte* or *constituto reo*. Otherwise the testimony will have no legal force whatever.[2]

237. The witnesses who are produced, or who repeat their testimony after the citation of the accused, must be examined in the same manner as in the processus informativus—to wit, separately, under oath, etc. As to the manner in which

[1] Pellegr., p. iv., sect. iv., n. 3.

[2] Ib., sect. ix., n. 1, 2, 3.

the questions are put to and the answers given by the witness, in this repetition, see the formula given in Pellegrino, P. IV., Sect. xi., n. 41, p. 417. Suffice it here to say, that the questions must be put to and answered by them, as though they had not given any testimony before.[1]

238. *Questions put to the witnesses.*—First, certain *general* questions are asked, to find out the age, occupation, residence, etc., of the witness. These should not be omitted, even though the facts to be elicited by them are well known to the judge; for these facts are not merely for the information of the judge of the first instance, but also for that of the higher judge to whom an appeal may be made.[2]

239. Next, *specific* questions relating to the cause are addressed to the witness. As to the order in which these questions should follow one another, see our *Elements*, Vol. II., n. 846, 847. See also the formula of examining witnesses which we subjoin in the appendix. In these forms, as given by Bouix[3] and Reiffenstcul,[4] it will be noticed that the *first specific* question is: "An sciat articulum esse verum?" That is, do you know whether the count or specification (*articulus*) just read to you is true? To enable the reader to understand this better, it is necessary to recall to mind that when the trial is *per viam accusationis*, or *denunciationis*, or *inquisitionis ad instantiam procuratoris fiscalis*,[5] the accuser, denouncer, or diocesan prosecutor presents, as a rule, a *libellus articulatus*, that is, a specific bill of charges, or one which not only states the charge, but also enumerates, under distinct heads, the various specifications or counts (*articuli*) of the charge. See our *Elements*, Vol. II., n. 988.

240. Here, then, it may be asked: Can the judge, auditor or diocesan prosecutor *begin* the special interrogatory by

[1] Pellegr., p. iv., s. xi.
[2] Reiff., l. 5, t. i., n. 373.
[3] De Jud., vol. ii., p. 539.
[4] L. 5, t. i., n. 380.
[5] This latter mode is the one prescribed by our *Instruction.*

reading to the witness the specification upon which he wishes to examine him, and asking him whether he knows it to be true? It is certain that the judge cannot do so, when he proceeds to a special judicial inquiry *ex mero officio*. For, in the case, the question would be a *leading question*, as the judge or prosecutor, by the very fact of putting such a question in the *very beginning* of the examination and before having asked questions more general, would plainly *indicate* or *suggest* the desired answer.[1]

241. Does the same hold true, when the trial is conducted *per viam accusationis*, or as in our case, per *viam inquisitionis ad instantiam procuratoris fiscalis?* There are two opinions. Reiffenstuel holds the negative and says that, in the case, the special interrogatory is begun thus: The specification upon which the witness is to be examined is first read to him; and he is then forthwith asked whether he knows it to be true.[2] Afterwards the other questions are put. The reason upon which he bases his opinion is, that under the circumstances the question, even though asked in the beginning, is not a *leading question*, since the crime and the criminal are already judicially manifested by the proceedings that have gone before.

242. The affirmative, however, is the opinion commonly held by canonists. For, as we have seen, they teach unanimously that the judge or prosecutor can, in no case, ask any question that indicates the desired answer. Now it is plain that by asking the witness *forthwith*, and in the beginning of the special interrogatory, whether he knows the specification to be true, he suggests thereby the answer. Consequently, as we say in our *Elements*, Vol. II., n. 847, the examination of the witnesses must, also according to the Instruction *Cum Magnopere*, be by general questions, ascending gradually to the more particular facts in the case. See the formula given by Bouix, de Jud., Vol. II., p. 537; Reiff., lib. 5, t. 1, n. 372, sq.

[1] Reiff., l. 5, l. c 1, n. 377. [2] Ib., n. 380

Art. XVIII.

The Oath taken by the Witnesses, and by Others who take any Part in the Trial.

XVIII. "Testes ad probationem, sive ad defensionem, si legalia impedimenta id non prohibeant, audiantur praestito juramento de veritate dicenda et si res postulet, etiam de secreto servando. Itaque antequam testificentur, cum de veritate tum de secreto jurent. Eo magis de officio fideliter adimplendo et de secreto, pro rei de qua agitur exigentia, servando omnes juramento abstricti sint oportet, qui in instructione processus ex suo munere partem aliquam habeant."

243. The auditor or judge conducting the *compilatio processus* must not only hear the witnesses one by one, as explained above, but he is, moreover, obliged to *administer the oath to them*, and that in the informative process which takes place prior to the citation and therefore *nondum constituto reo*, as well as after the citation of the accused.[1] This is in accord with the general law of the Church, which declares the testimony of witnesses null and void, unless it is given under oath, as we show more fully in our *Elements*, Vol. II., nos. 840, sq. The *Instruction* enacts that the witnesses shall not only swear that they will tell the truth, but also, if need be, that they will not divulge their testimony.[2]

244. In the Instruction of July 20, 1878 (§ 11. *Singuli;* Cf. our *Elements*, Vol. II., n. 843), it was prescribed that the oath should not be administered to the witnesses. The law was perhaps made, owing to the fact that the administering of oaths by ecclesiastics was considered contrary to the law of our country. We show, in our *Elements*, Vol. II., nos. 1344, 1345, 1426, and on page 444, that the laws of the United States, whether state or federal, are perfectly neutral and indifferent in regard to oaths administered by Bishops and ecclesiastical superiors. Consequently the ecclesiastical judge is perfectly free, with us, to administer oaths to wit-

[1] Cf. Bouix, de Jud., vol. ii., p. 520. [2] Our *Elements*, l. c., n. 845.

nesses and others taking part in the trial. As a matter of fact, in all the ecclesiastical trials of Protestant denominations in this country, the oath is always administered to the witnesses and others taking part in the proceedings. And yet no one has ever said that this was against the laws of the land.

245. The *Instruction*, therefore, rightly assumes, in the present article, that there are no legal obstacles in the way of administering the oath in our ecclesiastical trials, and consequently makes the oath obligatory, not only upon witnesses, but also *upon all who take any part in the trial* by virtue of their office. Consequently, besides the witnesses and experts, the following officials must also take the oath: The auditor, the diocesan prosecutor and his assistant, if he has any; the secretary; the messenger of the court, if there is one. These officials must swear that they will discharge their duties faithfully, and also, if the case requires, to maintain secrecy concerning the proceedings. Where, by Papal dispensation, commissions of investigation continue to exist *ad interim*, their members must take the same oath.[1] The oath is obligatory on all the above persons, on pain of nullity of the proceedings, even of the informative process. Hence they must take the oath before the beginning of the *processus informativus* which precedes the citation. For the form of this oath, see Monacelli Form., P. I., pp. 245, 247.

246. The *advocate* of the accused may also be obliged by the judge to swear that he will maintain secrecy, if the judge thinks that the nature of the case on trial demands it.[2]

247. In England, Ireland, and perhaps in the other dominions of the British Empire, it is forbidden by the civil law for any one to administer an oath, except he be authorized by law to do so, as we show in our *Elements*,

[1] Instr., art. xii. [2] Ib., art. xxxii.

Vol. II., p. 444. Consequently it would there be an illegal and punishable act for a Bishop to administer an oath to witnesses or others in ecclesiastical trials. In prescribing the oath, as explained above, the *Instructio* and the sacred canons are in full accord with the laws of the secular authorities all over the world. Thus, so far as concerns the United States, Hilliard writes:[1] "To secure the *veracity* and to determine the *ability* and *knowledge* of witnesses, the law has provided two general tests, viz: *an oath* and *cross-examination.*"

Art. XIX.

How Witnesses are Examined who are in a Distant Part of the Diocese, or out of it altogether.

XIX. "Testes qui in locis longe dissitis vel in aliena dioecesi degunt, mediante auctoritate ecclesiastica loci in quo manent, examinentur, in quem finem specimen factorum transmittetur: quae quidem auctoritas in responsione normas in hac Instructione contentas, observabit."

248. Sometimes the auditor or ecclesiastical judge conducting the trial or "compilatio processus," finds that the witnesses, who are to be examined, whether during the informative process which takes place prior to the citation of the accused, or during the process which follows the citation, are indeed *in the diocese*, but too far away to come without great expense, inconvenience and delay, or that they are in a different diocese. The *Instruction* enacts, in the present article, that in the first case, the witnesses shall be examined, (*a*) in the place where they are, (*b*) and that by an ecclesiastic living there or near by—*v.g.*, by the rural dean—to be delegated by the judge to that effect. For the formula of delegation, see Bouix, de Jud., Vol. II., p. 529. The letter of delegation is called *litteræ commissionales.* Bouix (l. c., p. 528) teaches that witnesses of the diocese

[1] Summary of American Jurispr., p. 301.

may be thus examined, not only when they are far away from the *curia*, but also when they are near by, but when the judge considers it inopportune to cite them to come to the *curia*.

249. In the second case, namely, when the witnesses are *in a different diocese*, the *Instruction* directs that they shall be examined by the ecclesiastical authority of such *diocese*—that is, by the Bishop, Vicar-general, or his delegate. For this purpose, the Bishop, Vicar-general, or auditor writes to the Bishop or Vicar-general of the place, where they are, requesting him to examine the witnesses. For the formula of this letter, which is styled *litteræ remissoriales*, see Bouix, l. c., p. 527.

250. In both cases, however, the *curia* is obliged to send, together with its request for the examination of the witnesses, a summary statement of the facts in the case, and also the questions to be put to the witnesses. The ecclesiastic thus deputed, or the authority thus requested, will examine the witnesses in the manner laid down in the *Instruction*, and, consequently, with the assistance of a notary to take down the depositions, one by one, under oath.[1]

251. Observe that, as Pellegrino correctly says, this mode of examining witnesses who are absent, or distant, or out of the diocese, applies not merely to witnesses for the prosecution, but also to those of the defence.[2] Hence, if the accused asks that witnesses in his favor, who are far away, or live in a different diocese, be examined as above, the Ordinary or judge is bound to comply with his request, and act according to article xix. of the *Instruction*. Otherwise, an appeal would lie against his refusal.[3]

252. *Q.* Has the opposite party—*i.e.*, the party against whom the witnesses are produced, a right to be present at

[1] Cf. Pellegr., p. iv., sect. iv., n. 90. [2] Ib., n. 65, 66.
[3] Ib., n. 66.

the examination of the above witnesses, who are either distant or out of the diocese?

A. We must distinguish: These witnesses are examined either during the informative process which precedes the citation, or during the trial proper which follows the citation of the accused. In the first case, namely, when they are examined prior to the citation, the opponent—*i.e.*, the defendant, has no right to be present either verbally or personally, since the examination is merely for the information of the court. But, in this case, the depositions have no value as legal proof of guilt, unless they are afterwards legalized, as we shall explain under article xxvi. Consequently, if the accused desires it, these witnesses must repeat their testimony, after the citation of the accused, and then the latter has the right to be present either verbally or personally at their examination, as we shall explain below in article xxvi. See also our *Elements*, Vol. II., n. 838, sq.; n. 1117.

253. In the second case, namely, where the examination takes place, *Constituto jam reo*, or after the citation of the accused, the opponent (*i.e.*, either the diocesan prosecutor or the accused and his advocate) has always a right to be present, either verbally or personally, as we show below in article xxvi., and our *Elements*, l. c.

254. *Witnesses examined "ad perpetuam memoriam."*—In connection with the examination of witnesses who are far off, or in a different diocese, it may not be amiss to discuss here the practical case of what is called the examination of witnesses *in perpetuam rei memoriam*. As a rule, witnesses cannot be produced before the ecclesiastical judge and examined, with any legal effect, that is, in such a manner that their deposition will have the force of legal proof of guilt or innocence, until after the accused has been cited, and the *litis contestatio* taken place.[1] The reason is, that

[1] Cap. Quoniam 5, ut lit. non. cont. (II. 6).

the testimony of witnesses and all other evidence has no legal or canonical force of proof, except it (*a*) be produced *during the trial*, and (*b*) touches on matters which are properly *in court;* for the judge can pronounce sentence only *secundum allegata et probata in judicio.* Now no cause or matter is considered as being in court or on trial, until the *litis contestatio* has taken place.[1] Hence, also, as we have seen, the deposition of witnesses in the United States, admitted and examined, even though under oath, by the auditor, in the informative proceedings prior to the citation, has simply the force of informing him whether he can issue the citation or not, but not the force of legal or canonical proof, sufficient for conviction and condemnation.

255. We say, *as a rule.* Now this rule, as all rules, has its exceptions. Thus an accused person or a defendant can, at any time, and before the trial or the *litis contestatio*, and in all causes, not only civil, but also criminal and disciplinary, produce before the ecclesiastical judge any witnesses he may choose, and have them examined *ad perpetuam memoriam*, and *in futuram sui defensionem*,[2] so that their deposition will, upon being published or communicated to the adverse party after the *litis contestatio*, or joining of issue, have the same effect as though it had been taken after the *litis contestatio.*

256. We say *at any time:* that is, the accused can produce his witnesses *ad perpetuam memoriam*, (*a*) not merely when he is actually about to be put on trial, but also *when he is merely afraid* lest he may be called to trial at some future time; (*b*) nor simply when there is danger that the evidence will be lost—*v.g.*, because the witnesses are in danger of death by reason of sickness, old age, etc., but also when there is no such cause.

[1] Cap. unic. de lit. cont. (II. 5); De Angelis, l. 2., t. 6, n. 2.

[2] Schmalzg., l. 2, t. 6, n. 3.

257. Herein the defendant's condition is more favorable than that of the plaintiff or prosecutor, whether official or private. For the latter (*actor*) can have his witnesses examined *ad perpetuam memoriam*, prior to the plea or *litis contestatio*, (*a*) only when there is danger that the testimony will be lost before the *litis contestatio* has taken place; for instance, when the witnesses are old, or sick, and therefore likely to die; or when they are about to move far away; (*b*) and even then, only in civil, not in criminal and disciplinary causes.

258. The reason of the more favorable condition of the accused is, that it is not in his power to be put on trial when he is ready or when he chooses, while the complainant or prosecutor can choose his own good time and bring on the trial at such time as is most convenient. If, therefore, the accused could not present his witnesses for the examination, until after his citation, and the *litis contestatio*, it is manifest that the plaintiff or prosecutor could maliciously delay the trial and the *litis contestatio* until the witnesses for the accused or defendant had either died, moved far away, or gone out of reach, and thus deprive him of his legal proofs and legitimate means of defence.

259. *Application of the above principles to the U. S.*—From what has been said, it follows that also, according to the present *Instructio*, the accused in the United States can have his witnesses examined *ad perpetuam memoriam* by the ecclesiastical judge at any time and before the trial. In order that the accused may be able to produce witnesses, and that the ecclesiastical judge may be able and obliged to examine them prior to the *litis contestatio*, nothing more is required, as we have seen, than that the accused should be actually about to be tried, or that he should fear lest he may be called to trial at some future time. If the ecclesiastical judge refuses to admit the witnesses, an appeal lies to the higher ecclesiastical judge.

It follows, moreover, that the diocesan prosecutor, with us, can indeed have his witnesses examined, prior to the "litis contestatio," for the information of the court; but the testimony in the case will not have the force of legal proof of guilt, since the prosecutor has no right whatever to have his witnesses examined, *ad perpetuam memoriam*, in criminal and disciplinary causes, as noted above.

260. *Q.* In what manner are witnesses examined *in perpetuam memoriam?*

A. In the same manner as that laid down above, in articles xvii. and xviii., for the examination of witnesses in general. Accordingly, when an accused person also with us requests witnesses to be examined *ad perpetuam memoriam*, the mode of procedure is this: The Bishop or Vicar-general presides at the examination, or deputes an auditor to do so. The witnesses are cited if need be. On the day appointed, they are examined, either by the judge himself, or, with his permission, by the accused or his advocate, and that one by one, under oath, and in the presence, personal or verbal, of the diocesan prosecutor, who has the right to cross-examine. The entire testimony must be taken down by the secretary or chancellor. In those causes, namely, in civil causes, where the plaintiff has a right to have witnesses examined *ad perpetuam memoriam*, the defendant must be notified to be present, either in person, or to send his interrogatories.[1] Cf. our *Elements*, Vol. II., n. 837, 844.

[1] Schmalzg., l. c., n. 12.

Art. XX.

Admissibility of Hearsay, or Indirect Witnesses.

XX. "Si indicentur testes, qui de factis vel circumstantiis ad meritum causae substantiale spectantibus interrogandi essent, nec examinari possint, vel quia non licet aut decet eos citare in judicium, vel quia rogati adesse recusent, necesse est id in actis commemorare, eorumque deficientia suppletur testimoniis aliorum, qui vel de relato vel aliter rem de qua quaeritur, noverint."

261. It may sometimes happen, especially at the present day, that the auditor or ecclesiastical judge, either in his informative inquiry, prior to the citation, or in the proceedings which follow the citation, will find that witnesses are mentioned as being personally and directly cognizant of the substantial facts in the case, and who yet cannot be examined, either because it is unlawful or unbecoming to call them as witnesses—*v.g.*, when they are wicked or adverse to the Catholic Church and would gladly divulge the offences of ecclesiastics, if occasion offered itself[1]—or because they have been cited or asked to come as witnesses, and yet have refused to do so. What is to be done in this case? The *Instruction* prescribes that the auditor or judge shall cause the notary to record the above facts among the minutes of the cause, and then endeavor to gain the requisite information from others, who know the facts not from personal or direct knowledge, but (*a*) from hearsay, *de relato—i.e.*, from rumor, or from other persons who are personally cognizant of the facts, (*b*) or in any other way.

262. In order to understand this article more fully, it is necessary to observe that witnesses are of two kinds: (*a*) those who have a *personal and direct* knowledge of the facts—*v.g.*, those who testify to what they have directly seen *with their own eyes* or heard *with their own ears;* they are called *testes de scientia:* (*b*) those who have a knowledge of

[1] Acta S. Sedis, vol. xv., p. 389.

the facts in the case from sources other than their own senses and therefore possess but an indirect knowledge.

263. These latter witnesses are subdivided into three classes: 1. *Testes de credulitate—i.e.*, those who testify under oath that they *believe* a thing to be true, not indeed because they have seen the offence or act itself, but because they have seen certain suspicious facts or things which lead them to infer and believe that a certain thing is true, or that a certain crime has been committed. Such are witnesses who testify that they have seen "solum cum sola, et nudum cum nuda in eodem lecto," and that therefore they believe that these parties have committed adultery. 2. *Testes de auditu alieno—i.e.*, those who testify under oath that they have heard a certain fact from *other persons* worthy of belief. 3. *Testes de fama*, or those who testify under oath that a certain common fame or public opinion is spread among the people.[1] We shall say a few words in regard to each of the three classes.

§ 1. *Witnesses "de Credulitate."*

264. *Q.* When are witnesses *de credulitate* admissible, and what force has their testimony, in case they can and are admitted, also according to the present *Instruction?*

A. The rule is that they are not to be admitted as witnesses and do not prove anything, especially in criminal and disciplinary causes.[2] The reason is that they base their belief on conjectures, presumptions, or suspicions, but not on personal knowledge. Now these conjectures, suspicions and indications of facts or of guilt may indeed point more or less strongly to the guilt. But they nevertheless remain mere suspicions and indications. Consequently they cannot, no matter how numerous, remove all reasonable doubt of guilt. Hence they cannot give that moral cer-

[1] Santi, l. c., l. 2, t. 20, n. 28.

[2] Reiff., l. 2, t. 20, n. 348, sq.

tainty which is necessary, also according to our Instruction, for conviction.

265. We say, *the rule is;* for these witnesses are admissible also in criminal causes (*a*) when they are produced *for the defence* of the accused—*i.e.*, in order to testify to his *innocence;*[1] (*b*) when there is question of crimes—*v.g.* fornication,—which are usually committed in so secret a manner as not to be witnessed directly by any third party. For direct witnesses can scarcely ever be obtained in these cases. Consequently, unless indirect testimony were admitted, such crimes could never be proved.[2] This teaching is also clearly contained in our Instruction. For the present article indicates that witnesses of this kind can be admitted only where direct witnesses cannot be had.

266. But even in this second case, where such witnesses are admissible *against* the accused, their testimony is worth neither more nor less than are the conjectures, signs, indications upon which they base their belief. Thus, if they testify to very violent indications of guilt—*v.g.*, if they state that they saw *nudum cum nuda in eodem lecto*, and therefore believe the parties to be guilty of fornication, their testimony, at least, if sufficiently corroborated by other circumstantial evidence, constitutes, according to some canonists, full proof of guilt;[3] according to others, only a presumption of guilt. See our *Elements*, Vol. II., n. 880.

§ 2. *Witnesses "de Auditu Alieno."*

267. Here the following questions present themselves: *First*, when are these witnesses *de auditu alieno* admissible, in criminal and disciplinary causes, also according to the present *Instructio?* *Second*, what is the value of their testimony, where they are admissible?

[1] Cap. *quoties*, et Cap. *de testibus*, de Purg. can. Reiff., l. 2, t. 20, n. 353.
[2] Reiff., l. c., n. 350, sq. [3] Santi, l. c., l. 2, t. 20, n. 30.

268. In answer to the first question, we remark, these witnesses are admissible (*a*) as witnesses *for the defence*, that is, they are always allowed to testify *in favor of the innocence of the accused*;[1] (*b*) they are admissible *against* the accused, only when the eye or ear-witnesses from whom they have received their information cannot be had—*v.g.*, where they are dead, or out of reach physically or morally, namely, when they are too far away or refuse to testify. This holds so true that if the prosecutor attempted to produce witnesses *de auditu alieno*, even where the direct witnesses are alive and can be produced, he would at once lay himself open to suspicion.[2] Consequently, also, the party producing such witnesses must *prove*, not merely state, that the eye or ear-witnesses cannot be had.

269. As to the second question, namely, what is the value of the testimony of these witnesses, where they are admissible, also in criminal and disciplinary causes with us, we answer that these witnesses are not witnesses in the proper sense of the term, and no matter how numerous, do not prove anything against the accused. For, it is expressly enacted in the law of the Church, as we show elsewhere, that only those are competent witnesses and therefore constitute *probatio legalis*, who have received the knowledge of the facts in the case, *through their own senses*, and not from others. (Our Elements, Vol. II., n. 853).

270. However, when their testimony is strengthened not only by public fame, but also by other indications of guilt, they constitute a *presumption* of guilt, more or less strong, according to circumstances. Now canonists generally teach that mere presumptions, no matter how numerous, can indeed, like all other indirect or circumstantial evidence, throw light on the facts of the case, or furnish *indications* of guilt, but never constitute full proof of guilt. Therefore,

[1] Reiff, l. c., n. 368. [2] Ib., n. 372.

it can never suffice for conviction and condemnation in criminal and disciplinary causes. Consequently, it seems to us that the present article, in allowing witnesses *de auditu* to testify, simply implies that their testimony is to be regarded as indications, not proofs of guilt. (See our *Elements*, Vol. II., n. 880).

§ 3. *Hearsay Witnesses—"Testes de Fama, de Relato."*

271. We have already spoken at some length of common fame in our *Elements*, Vol. II., nos. 954, sq. Here we shall but add a few explanatory remarks, and apply what we say in our *Elements* to the proceedings which are conducted in accordance with the present *Instructio*.

272. *Q.* When are hearsay witnesses (*testes de fama*) admissible, also in our criminal and disciplinary trials, and what is the value of their testimony, when admitted?

A. Before answering, we must make a few prefatory remarks. Public opinion (*fama communis*) regarding the guilt of a certain person is of three kinds: (*a*) That which is but an empty rumor among the people, does not proceed from determinate persons, and has no solid foundation. This kind of defamation is to be completely despised.[1] (*b*) That which proceeds from determinate persons, who, however, are animated by malice or selfish motives. This sort of public opinion is also to be wholly disregarded.[2] (*c*). Finally, that which originates with persons who are worthy of belief, of good character and whose interests are not involved in the case.[3] Of this third or last kind of public opinion only do we here speak, since it alone has any weight whatever. However, in order that this kind of public opinion may have any weight, the following conditions are required: 1. It must be uniform, solid, constant, unchanging, not

[1] L. de Arrionum, C. de Pœnis; cap. 24 de acc. [2] Cap. 24 de acc.
[3] Ib., Reiff, l. 2, t. 20, n. 391.

vague, light or conflicting. 2. It must be proved that it does in reality exist, and that it has arisen from facts and circumstances which justly led the people to believe and speak of the offence or facts. We say, it must be *proved* that it does, etc. How, then, can the existence of *fama* be proved? By the testimony of *two witnesses*, who are above all suspicion or objection.[1] These are the kind of witnesses of whom we now speak. By *testes de fama*, therefore, we here mean those who testify to the existence and characteristics of the third kind of public opinion.

273. We now answer: There is question of admitting these witnesses either *before* the trial begins, for the purpose of authorizing the Ordinary to begin the trial, or *after* the trial has begun, in order to prove the guilt of the accused. In the first case, these witnesses are admissible unconditionally, provided they are above all objection: and the sworn testimony of two such witnesses establishes the existence of *fama communis*, and consequently authorizes the Ordinary to commence a special judicial inquiry. But it has no further weight whatever as proof.

274. In the second case, these witnesses can be allowed to testify only when other witnesses who are competent in law—namely, direct eye and ear-witnesses, cannot be had. For the law of the Church justly requires that, especially in criminal and disciplinary causes, the proofs and consequently also the witnesses shall be *without any defect or flaw*; that, consequently, defective witnesses, such as the hearsay witnesses in question, are not admissible, except when it is proved that perfect and qualified witnesses cannot be obtained. But even in the case where these witnesses are admissible, their testimony has only the same force as the common fame itself. Now, common fame has not, in criminal and disciplinary causes, the force of even a semi-full

[1] Cap. 21 de acc.; Reiff., l. c., n. 393, sq.

proof (*probatio semi-plena*) but merely of an *indication* of guilt. Hence the testimony of witnesses *de fama*, no matter how numerous, cannot convict the accused.[1] In this sense only does the present *Instructio* allow them to be admitted as witnesses, as is plain from the wording of the article now under discussion.

275. However, where these witnesses cannot be admitted *against* the accused, save in the exceptional cases given, they must always be admitted when they are produced *in favor of the accused;* for the law accepts even such defective witnesses as competent witnesses to prove the innocence of the accused.[2]

276. Lastly, as the article under discussion speaks of the *citation* of witnesses, we ask: Is it necessary to cite the witnesses, in order that their testimony may be legal and have the force of proof? The rule is that a witness who presents himself spontaneously, whether in the informative inquiry that precedes the citation of the accused, or in the trial which follows the latter's citation, is suspected of falsehood and therefore does not prove anything. We say *spontaneously;* now, a witness is said to present himself spontaneously, when he appears either without having been juridically cited, or without having been requested to come by the judge or the party.[3] Hence, when it is probable or certain that a witness will appear, if *asked*, it is not necessary that he should be juridically cited: it is sufficient, in the case, if the judge (or litigant) requests him by *private letters* to appear as a witness. The formula for such private letters is given by Bouix, de Jud., Vol. II., p. 521.

277. Where the witness, however, refuses to comply with these private letters, or where the judge or auditor thinks that private letters will not obtain the desired result,

[1] Santi, l. c. [2] Cf. Schmalzg., l. 2, t. 20, n. 112.
[3] Pellegr., Praxis, p. iv., sect. iv., n. 3.

the proper mode of procedure will be to issue a *formal juridical citation* to the witness at the request of the party wishing to produce him. For the formula of this citation, see Bouix, de Judic., Vol. II., p. 521, 522; Pellegrino, Praxis Vicar, p. iv., sect. iv., n. 96. See our *Elements of Ecclesiastical Law*, Vol. II., n. 836.

278. A copy of the citation or request should, moreover, be filed among the acts, so that it may juridically appear that the witness did not come of his own accord.[1]

279. We have said above, the *rule is;* for where the party against whom a *spontaneous* witness testifies is present and does not appear, the latter's testimony becomes that of a competent witness.[2]

280. Sometimes witnesses, even though cited, refuse to appear for examination, or if they appear, they refuse to answer, and that either through fear, hatred, etc. Can the ecclesiastical judge, also in the United States, compel them, even by punishments, to comply with the citation? For the answer see our *Elements*, Vol. II., n. 860, 861.

281. We merely add, it is beyond doubt that in *civil causes* of the ecclesiastical forum, witnesses can be compelled to appear and to answer. Can they be compelled to do so also *in criminal and disciplinary causes?* There are three opinions. The *first* denies absolutely, on the ground that even though the truth be concealed, in a criminal cause, the only effect will be that the guilty person will not be punished; and consequently no special injury is done to any person. The *second* affirms, chiefly because the public good of the faithful requires that crimes shall not go unpunished. The *third* opinion holds a middle course, and teaches that witnesses can be compelled to testify in criminal causes, in the following cases: 1. Where otherwise the truth cannot be known. 2. Where the witness *maliciously* evades giving

[1] Pellegr., l. c., p. iv., sect. iv., n. 3 [2] Reiff., l. c., t. 20, n. 416, 417.

his testimony; or where the adverse party—*v.g.*, the prosecution, *maliciously* hinders the production of the witness. 3. Where, in a criminal or disciplinary cause, the witness is produced *by the accused to prove his innocence;* for in this case, the witness is bound to testify, even though not asked. 4. When there is question of crimes which are injurious to others, and therefore cannot be concealed without danger to the public;—such are simony, heresy, etc. 5. Finally, in all cases where the truth cannot be withheld without a grievous sin. This third opinion is sustained by Schmalzgrueber, l. 2, t. 21, n. 17.

282. It should be observed, however, with Pellegrinus, that while, according to the *written* law of the Church, as laid down in the sacred canons, it does not seem that witnesses can be compelled to testify in ecclesiastical causes of a criminal nature, yet, by *universal custom*, the contrary practice has been introduced into all the ecclesiastical curias. By virtue of this general custom, which now has the force of law, it is at present lawful for ecclesiastical curias, also in the United States, to compel witnesses to appear also in criminal causes, and that by pecuniary fines, and if need be, also by censures. [1]

283. We have seen above, under article xii., that when the *compilatio processus* is entrusted to an *auditor*, the latter cites and examines the witnesses. Here it may be asked: Has he also, by virtue of his office, the power to compel witnesses, even by punishments, to testify? On general principles, he would seem to possess this power. For, a person who is appointed to discharge certain functions has, by this very appointment, all that power and authority which are necessary to enable him to perform his duties properly, unless where the contrary is expressly stated. On the other hand, the infliction of censures, or other punishments, upon refrac-

[1] Pellegr., l. c., p. iv., sect. v., n. 4.

tory witnesses is such a grave and delicate matter, especially at the present day, that it seems safer to hold that the power in question is reserved to the Bishop, and becomes vested in the auditor only when it is *expressly* delegated to him by the Bishop.

CHAPTER III.

THE TRIAL CONTINUED—FROM THE CITATION TO THE DEFENCE OF THE ACCUSED.

(FROM ART. XXI. TO ART. XXVII.)

ART. XXI.

Citation of the Accused.

XXI. "Ubi id omne quod ad veritatem factorum constituendam et culpam accusati probandam pertinet, absolutum fuerit, imputatus intimatione scripta, ad examen vocatur."

284. In the preceding articles (art. xi.–xxi.), we have chiefly discussed the duties and functions of the auditor or investigating judge prior to issuing the citation to the accused. We have seen that before issuing the citation, he should collect all the proofs which go to show the guilt or innocence of the accused, in order that it may appear juridically whether there is sufficient ground for issuing the citation. It has also been shown that, for this purpose, he can and should cite and examine witnesses, and also receive and examine all other proofs which are presented or submitted to him by the diocesan prosecutor. We have, moreover, seen how he is to examine the witnesses. Finally, it has been remarked that this preliminary investigation should be as full and impartial as possible, since its object is not merely to find out the guilt, but also the innocence of the accused.

285. When the auditor has finished this preliminary investigation, or *processus informativus*, he must carefully weigh the evidence and see whether there is sufficient ground for citing the accused. If he does not find at least half proof of

guilt, all further proceedings must be stopped. But if he finds there is complete, or, at least, half proof of guilt, he can proceed to the citation. This is evidently also the meaning of the present article of the Instruction, when it says: "Ubi id omne quod . . . *ad culpam accusati probandam* pertinet, collectum fuerit, ad examen vocatur." The *Third Plenary Council of Baltimore*, n. 312, very justly adds: "Cavendum est ne vocetur antequam *omnia collecta fuerint*, quæ facti existentiam atque imputati culpam ostendant."

286. In regard to the nature of the citation, its conditions, mode of service, necessity, and effects, see our *Elements*, Vol. II., nos. 994–1010.

287. Here we shall briefly call attention to a provisional measure which the auditor or judge may sometimes adopt, after the *processus informativus* is completed, and that either before or after the citation of the accused. It has been seen that when it appears, at the end of the informative process, that there is a *probatio legalis* which amounts at least to a half proof of guilt, the accused can be cited for trial. In this case, that is, where the *probatio legalis* has been obtained, the accused may sometimes be commanded by the auditor or judge *to retire into a monastery or other suitable place, during the time the trial goes on.* The auditor may issue this command either before or after the citation.

288. We say *sometimes;* for this provisional measure is equivalent to ecclesiastical imprisonment (*carceratio*), and therefore always inflicts great disgrace upon the accused. Hence it is considered a *very serious punishment*, nay, a *damnum irreparabile*, like a censure, to which it bears a strong resemblance.[1] Consequently it cannot be inflicted by the auditor or judge, save (*a*) when there are extant legitimate proofs of guilt, obtained, not extrajudicially, but judicially—*i.e.*, during the juridical *processus informativus*, as explained;[2]

[1] Pellegr., part. iv., sect. vi., n. 18.

[2] Pellegr., l. c., n. 11.

(*b*) when the crime in question is *very grave* and *atrocious*, and moreover, *causes great scandal*, so that the accused cannot continue to exercise the sacred ministry *publicly and in the midst of those among whom his offence is known*, without grave scandal and injury to religion.

289. Pellegrinus teaches that, owing to the disgrace entailed by this constructive imprisonment, the ecclesiastical judge who orders it, without the above conditions, renders himself liable to heavy damages to the accused.[1]

290. This assignment to a religious house or other suitable place is called *preventive* or *provisional* imprisonment, and is to be distinguished from *afflictive* imprisonment, which is sometimes inflicted as a regular punishment, after the trial is entirely over, and sentence of condemnation has been passed.[2] (See our *Elements*, Vol. III.)

291. In connection with this matter, it may not be out of place to refer briefly to a mode of procedure which was formerly in use, but is now abolished, namely, the *purgatio canonica*. It has been seen that, at the present day, when, at the conclusion of the *processus informativus*, no legal half proof of guilt is obtained, the accused cannot be cited, tried or punished. In former days, especially in the twelfth and thirteenth centuries, a different practice existed. For when, in those days, it was found, upon due investigation, that there was *public defamation* imputing a certain atrocious crime to a certain ecclesiastic, and when it was, moreover, found that there were strong indications of guilt, but yet that the guilt could not *be fully and juridically proven*, the procedure called the *purgatio canonica* took place. That is, the accused, if the public fame continued, was first suspended *ob officio*, and then commanded by the ecclesiastical judge to swear on the holy gospels that he did not commit the crime. This oath had to be supplemented by a similar

[1] Pellegr., l. c., n. 15, 16. [2] Stremler, l. c., p. 62.

oath of a certain number of other persons, called *compurgatores*.

292. When he had thus purged or cleared himself (*purgatio canonica*) of the suspicion of guilt, the suspension was remitted, and he was fully reinstated. If he failed to purge himself as above, sentence of condemnation was pronounced, by which he could be deprived of his office and benefice and consigned to a monastery.[1] This procedure is no longer in use.[2]

Art. XXII., XXIII.

Contents of the Citation.

XXII. "In intimatione, nisi prudentia obstet, accusationes contra reum perlatae, per extensum referuntur, ut ad responsionem se parare possit."

XXIII. "Quod si ob accusationum qualitatem vel alia de causa haud expediat, ut in intimatione exprimantur, in hoc satis erit innuere, ipsum ad examen vocari ut in causa, de qua contra eum fit inquisitio, sese defendat."

293. Both these articles, showing that, as a rule, the accusations must be in full communicated to the accused simultaneously with the citation, are plain, and, moreover, sufficiently explained in our *Elements*, Vol. II., Nos. 1002, 1003.

294. Here we merely remark that when the auditor, or investigating judge, sends the charges to the accused, together with the citation, he can do so by simply enclosing a copy of the bill of charges, made out by the diocesan prosecutor, and amended or altered by him, if need be, at the end of the preliminary investigation, prior to the

[1] Cap. 6, 10, de Purg. Can. (v., 34).

[2] Reiff., l. 5, t. 34, n. 20; Giraldi, Exp. Jur. Pont. ad tit. de purg. can.; Molitor, Trials, p. 237.

citation. We say, *amended or altered;* for the accuser or prosecutor may change his *libellus* or indictment until the *litis contestatio* has taken place, as we show in our *Elements*, Vol. II., n. 991.

Art. XXIV.

Contumacy of the Accused, or his Refusal to Obey the Citation.

XXIV. "Si ad examen accedere recuset, iterum fit intimatio, atque in ea congruum tempus peremptorium praefinitur intra quod reus coram tribunali se sistere debeat, eique significatur, si non pareat, contumacem esse judicandum; quam intimationem si haud probato legitimo impedimento transgrediatur, ut contumax de facto habebitur."

295. This article outlines the mode of procedure to be followed in case the accused refuses to obey the citation. The *Instructio* enacts that a simple citation shall first be issued to the accused;[1] that if he refuses to obey this citation, and fails to appear in court, he shall be cited a second time, and that peremptorily; that if he contemns even this second citation, he shall be adjudged contumacious, unless he can prove that he was lawfully hindered from coming.

296. Accordingly, when the accused fails to obey the second citation, the diocesan prosecutor moves that he be juridically declared contumacious. Before making this declaration, the auditor or judge should, by a summary investigation, ascertain whether the disobedience of the accused is excusable or not. For this purpose, he should carefully weigh the excuses, which the accused himself may have sent, or which may otherwise appear, as we show in our *Elements*, Vol. II., N. 1023. If he finds that there is no sufficient excuse for the disobedience, he formally declares the accused contumacious.[2] For the causes excusing from

[1] Art. xxi.

[2] Arg. Cap. Cum Dilecti 6, de dol. et cont. (ii. 14); Reiff., l. 2, t. 14, n. 122.

contumacy, see our *Elements*, l. c., n. 1013. For the formula of this declaration, see Bouix, de Jud., Vol. II., p. 559.

297. After this declaration of contumacy, the auditor or judge appoints *ex officio* an advocate to represent and defend the absent and contumacious accused, and then a day is set for the trial to go on in the absence of the accused. On the day appointed, the trial goes on as though the accused were present in person. The diocesan prosecutor conducts the prosecution, and the advocate appointed *ex officio* for the accused, takes charge of the defence.[1] See our *Elements*, Vol. II., n. 1016.

298. It should be observed here, as the *Third Plenary Council of Baltimore*, n. 313, teaches, and as we show in our *Elements*, Vol. II., Nos. 1016, 1021, that the contumacy of the accused constitutes a strong *presumption*, but not a full *proof* of guilt. Consequently, the guilt of the accused who is contumacious must be established by legal proof, just as though he were present at the trial.

299. As to the punishments which may be inflicted upon the accused for his contumacy, apart from the question of his guilt or innocence of the crime for which he was cited for trial, see our *Elements*, l. c., nos. 1020, 300, sq.

Under No. 1022 (*Elements*, Vol. II.) we say, in common with all canonists, that "an accused who is in contempt *can be excommunicated* for such crime of contempt."[2] This must, however, be understood in the light of the following enactment of the Council of Trent:[3] "As regards judicial causes, it is enjoined on all ecclesiastical judges, of whatsoever dignity they may be, that both during the proceedings (or trial), and in giving judgment, *they abstain from ecclesiastical censures or interdict*, as often as an execution on the person or property can, in each stage of the process, be effected by them of their own authority. . . . In like manner, in criminal

[1] Prague Instruction, § 62, 64, 65; Droste, p. 131.

[2] Cap. Tuæ fraternitatis 3 (ii. 6).

[3] Sess. 25, Cap. 3 de Ref.

causes, wherein an execution can, as above, be effected upon the person or goods, *the judge shall abstain from censures;* but if that execution cannot easily be made, it shall be lawful for the judge to employ the said spiritual sword against delinquents; provided, however, the character of the offence so require, and after two monitions at least."

301. Canonists interpret this decree to mean that censures can be inflicted only in the one case, where the accused, after having been condemned for a grave offence, eludes the execution of the sentence; that consequently they cannot be imposed for the contumacy in question.[1] Thus Pierantonelli[2] says it plainly follows from the above decree of the Council of Trent (sess. 25, c. iii., de Ref.) that the ecclesiastical judge must abstain from inflicting censures for contumacy, not only when he can punish the contumacy by temporal punishments, such as pecuniary fines, but also when it is in his power to go on with the trial and to execute his final sentence of condemnation. In the same sense Reiffenstuel,[3] speaking of the infliction of censures for contumacy, teaches: "Quinimo Concilium Trid., sess. 25, c. iii., de Ref., saluberrime mandat omnibus judicibus ecclesiasticis, quod ad pœnam excommunicationis non procedant, quantocunque executio realis vel personalis adversus reos fieri poterit."

302. The second condition of inflicting censures for contumacy, is that the ecclesiastical judge must give the accused who is contumacious, at least two warnings beforehand that he will inflict censure, unless he appears and obeys the citation. This is expressly stated by the Council of Trent.[4]

303. Pierantonelli[5] remarks, moreover, that the laws and regulations which govern citations, their execution, and the contumacy of the party cited, apply not only to the citation

[1] Droste, p. 130. [2] P. 134. [3] L. ii., t. 14, n. 141.
[4] Sess. 25, c. iii., de Ref. [5] P. 135.

calling the accused to trial, but also to all the other citations or notifications which are made during the progress of the trial, so that a stubborn disobedience to these authorizes the judge, at any stage of the trial, to open contumacy proceedings, that is, to go on with the trial in the absence of the contumacious party, etc., in the manner explained.

304. *Q. Can the two citations prescribed by the Instruction be sometimes contracted into one?*

A. The affirmative would appear to follow, from the fact that the general law of the Church, though it prescribes three simple citations,[1] yet allows the ecclesiastical judge to contract them into one peremptory, where the circumstances of the case require it. See our *Elements*, Vol. II., n. 997. Notwithstanding this, the negative seems the true opinion. For it appears to us that the argument taken from the general law of the Church does not hold. In fact, the common law of the Church, while prescribing three simple citations, *also expressly authorizes* the ecclesiastical judge to contract them into one peremptory, where there is sufficient reason for so doing, whereas the *Instructio*, while expressly requiring two citations—one simple, the second peremptory —*does not say a single word* about contracting them into one.[2]

305. For fuller information concerning contumacy, its effects, mode of procedure, etc., also in the United States, see our *Elements*, Vol. II., n. 1010–1026.

306. For the mode of procedure in case of contumacy, to be followed by commissions of investigations, where they still exist, see our *Elements*, l. c., n. 1017, 1024, 1025.

[1] Can. de illicita, 6, § quicunque, causa 24, q. 3.

[2] Cf. Conc. Pl. Balt. iii., n. 313.

Art. XXV.

The Hearing Given the Accused as soon as he Appears on due Citation—Exceptions Proposed by him.

XXV. "Verum si ad examen accedat, audiatur; et ubi inductiones alicujus valoris exhibeat, eæ, quantum fieri potest, accurate discutiantur."

307. Having, in the preceding article, outlined the mode of procedure in case the accused fails to come into court, the Instruction now describes what is to be done when he obeys the citation and appears in court. Accordingly, as soon as the accused appears before the auditor or ecclesiastical judge, conducting the *compilatio processus*, the latter should at once, and before proceeding to the *litis contestatio*, admit him to a hearing, in order to give him a chance to establish his innocence forthwith, and without any further proceedings, and also to make legitimate exceptions.[1] This hearing is called the *constitutum*, from the word *constitutus*, with which the notary begins the minutes of the proceedings.[2] Our *Elements*, Vol. II., n. 1026, sq.

308. How is this first hearing conducted? Either the indictment or charges were sent to the accused, together with the citation, as directed in article xxii., or not. If not, the auditor directs the diocesan prosecutor to read the charges to the accused and to give him a copy of them. Then, if the accused desires it, a delay must be granted him to enable him to prepare statements and exceptions which he may wish to make in his first hearing.[3] At the expira-

[1] Todeschi, § 12, 13, p. 504.

[2] The formula in which the notary generally begins these minutes is: "Constitutus personaliter in curia coram Rmo Vicario Generali, etc., meque actuario, assistente Rmo Promotore fiscali curiæ episcopalis, D. N. fuit per eundem Vicarium gen. interrogatus, etc." (Acta S. Sedis, vol. xv., p. 391).

[3] This seems to follow clearly from art. xxviii. of the *Instructio*. Consequently the teaching of Pellegrino (p. ii., sect. i., subs. v., n. 20) that this deliberative delay is granted only in civil, but not in criminal causes (Ib., p. iv., sect. ix., n. 44) does not appear applicable in our procedure.

tion of this term or delay, the hearing takes place in the manner which we shall presently describe.

309. If the charges were sent to the accused simultaneously with the citation, the auditor, though not obliged, will yet laudably direct the prosecutor to read the indictment to the accused; then he will ask the latter to make any statement or answer he may wish. Of course the auditor is at liberty, not only now, but at any stage of the trial, to ask him proper questions for the purpose of bringing out more fully and clearly the facts in the case. The accused may or may not make any statement or answer, as he pleases. Nor is he bound to confess his guilt, even though the auditor interrogates him lawfully, at least when he has reason to believe that a grave punishment will be inflicted upon him, if he confesses.

310. If, however, he desires to make any observations, he should be heard patiently, and allowed freely and fully to give his own version of the facts in the case, without being interrupted in his narrative. His entire statement and all his answers must be accurately and truthfully written down by the notary. When the first hearing is over, these minutes are read to the accused, and may be signed by him after they have been corrected, if need be, according to his suggestions. They are also signed by the auditor and the notary. Rota, p. 470, n. 709, advises the accused to speak but sparingly, according to the poet: "Nulli tacuisse nocet, nocet esse locutum."

311. The *Instructio* justly ordains that if the accused, in the first hearing, makes statements which are of some weight, they should be fully discussed and considered. For it may happen that already, in this first hearing, and before the plea is entered, the innocence or guilt of the accused will be established and thus all necessity for further proceedings ended. Thus the accused may at once, by letters or documents, prove an *alibi;* or he may also show that al-

though he committed the offence materially, he did not formally ; in other words, that he acted from ignorance, not from malice, etc. Or again, inversely, he may make damaging statements, criminating himself.

312. The auditor, as we have said, is at liberty to ask him questions, for the purpose of clearing up the alleged facts in the case, and that both in this hearing, and at any subsequent stage of the proceedings. Here, then, it may be asked: Is the accused, when asked by the auditor, bound to confess his guilt? For the answer, see our *Elements*, Vol. II., n. 1110, sq. Here we shall merely remark that, in former days, great stress was laid upon the preliminary examination or hearing of the accused which took place prior to the *litis contestatio.*[1] The accused was obliged to swear, at the beginning of the hearing, that he would tell the truth, upon being lawfully interrogated by the judge. Hence, also, as we show in our *Elements*, l. c., n. 1112, sq., it was the more general opinion of canonists that the accused was bound to confess his guilt, in answer to legitimate questions put by the judge.

313. At present, however, it may be said that the opposite opinion, which holds that the accused is not bound to tell the truth and confess his guilt in answer to lawful questions of the judge, is perfectly true and safe.[2] This is inferable from the fact that although, at present, the auditor, or ecclesiastical judge, can and should *exhort* the accused to tell the truth, he is strictly forbidden to oblige or even allow him to take the oath that he will tell the truth (*juramentum veritatis dicendæ*), as we show in our *Elements*, Vol. II., n. 1077.[3] In fact, all modern legislation, ecclesiastical as well as secular, is based on the principle that the prosecutor must

[1] Pellegr., part.iv., sect. ix., n. 1.

[2] Rota, p. 466, n. 704.

[3] The object is to prevent the accused from perjuring himself. Consequently, though he cannot be allowed to take the oath when testifying or answering *in his own behalf*, he can be sworn when he acts as witness for or against *other persons*.

prove the guilt, and that consequently the accused is not bound to confess his guilt, and thus become himself the instrument of his own conviction. Accordingly, the Church has at present abolished not only the oath, as just stated, but also the torture, both of which were used formerly, in order to compel the accused to answer.

314. Besides being allowed, in this first hearing, to give his own version of the accusations made against him, he must also be heard in regard to any exceptions he may wish to propose. For, as we say in our *Elements*, Vol. II., n. 1026, "after the citation has been issued, and the accused comes into court, he may, without joining issue, and before entering upon the cause, or into the merits of the charges, make various exceptions or objections, which either throw the case altogether out of court, or at least delay it." These exceptions, if dilatory, should be fully and accurately discussed before the *litis contestatio* takes place. We say, *if dilatory;* for peremptory exceptions may, nay, should, as a rule, be made also after the *litis contestatio*, as we show in our *Elements*, Vol. II., n. 1033.

315. Here it should be observed that the dilatory exceptions *against the auditor or judge* should be proposed before any other dilatory exception; otherwise the party is presumed to have accepted the judge or auditor. See our *Elements*, Vol. II., n. 1052. The accused should, therefore, before all else, make the exception against the judge, if he sees fit. For the various kinds of exceptions, the mode of discussing, proving and deciding them, see our *Elements*, l. c., n. 1026–1055.

Art. XXVI.

The Plea or Issue and the Production of the Proofs of Guilt.

XXVI. "**Deinde accedendum est ad contestationem delicti et argumentorum quae prostant, ut inquisitus et culpabilis habeatur et in poenas canonicas incurisse censeatur.**"

§ 1. *The "Contestatio Delicti."*

316. When the first or preliminary hearing is over, that is, after the statements made by the accused have been heard, and his exceptions fully discussed, and either wholly or partially admitted or rejected, or decision on them reserved, in order to be given together with the final sentence, the entering of the plea, or the *litis contestatio*, takes place,[1] as is stated in the article under discussion. The joining of issue or the *contestatio delicti* or *litis* consists in the affirmation of the crime and all its specifications by the diocesan prosecutor, and the denial of them by the accused made in court, after the first hearing. See our *Elements*, Vol. II., n. 1065.

317. The manner in which it takes place is this: The auditor or judge first assigns a term to the diocesan prosecutor to formulate or frame the various specifications or counts (*capitula*) of the charges.[2] Next the accused is cited to hear and to reply to them on a fixed day.[3] On the day appointed they are read to the accused in court by the prosecutor, and the defendant is asked by the auditor, in regard to each specification, whether he admits or denies it. His answer is carefully noted in the minutes or acts of the case.[4]

318. We say, "the auditor first assigns a term to the prosecutor"; this is to be understood with the proviso, if

[1] Pellegr., Praxis Vicar., p. 68, Venetiis, 17[illegible]6.

[2] This term or delay is called *terminus ad articulandum or capitulandum.*

[3] This term is styled *terminus ad dicendum contra capitula.*

[4] Rota, l. c., p. 471; Pellegr., l. c., p. iv., sect. ix., n. 57; Ib., sect. x., n. 86.

the prosecutor desires it. For the first hearing may not have brought out any new facts, and, consequently, he may not find it necessary to add to, change, or drop any of the charges and specifications which were sent to the accused simultaneously with the citation, or read to him on first appearing in court. In this case he would be ready to proceed forthwith to the contestation, that is, to present his specifications, and, therefore, would not be in need of any delay. In like manner, the accused, if he has been informed of all the charges and specifications, either when the citation was sent, or as soon as he appeared in court, and if no changes are made in these by the prosecutor after the first hearing, may be ready for the *litis contestatio* as soon as the first hearing is over, without asking for or being granted a new delay.

319. Where, however, the prosecutor finds that the results of the first or preliminary hearing make it necessary for him to modify his charges and specifications,—and he can, as we have seen, alter them until after the *litis contestatio*—he can, if he wishes, obtain a delay to enable him to frame the specifications which he wishes to present for the *litis contestatio*, in accordance with the results of the first hearing. In this case, the changes made by the prosecutor must be communicated to the accused and a suitable delay allowed him to prepare his categorical replies. Observe that the above delays are substantial, and, consequently, must be granted to the parties, if they ask for them, on pain of nullity of the proceedings, and that also in criminal causes, which are tried in a summary manner, as laid down in the *Instruction*.[1]

320. Here it will be seen that we interlink the *litis contestatio* with the *capitula*. Strictly speaking, however, the two are distinct and separate. For the *litis contestatio* con-

[1] Pellegr., p. iv., sect. ix., n. 56; Rota, p. 476

sists in the *general* plea, that is, in the *general* denial of the charges by the accused, whereas the *capitula* and the answer thereto consist in the *specific* plea, or in the *specific* denial by the accused or defendant of the *specific* deeds or details of the general charge or complaint. Consequently, in *civil* causes of the ecclesiastical forum, the *litis contestatio*, or general plea, is always distinct from, and, as a rule, precedes the *positiones*.[1] In other words, the defendant first denies the complaint *in general*, or *in toto*, and thus contests the case. Then the plaintiff presents his specifications (*positiones*), and the defendant gives his *specific* answer to each.[2]

321. But in *criminal causes*, also as tried in accordance with our Instruction, the two—the general (*litis contestatio*) and the specific plea (*capitula*)—are interwoven in such a manner as to constitute but one and the same act. Of course, before the accused is asked to give his specific answer to the specifications, he should be asked and allowed to put in his general answer or denial. And this general denial forms, properly speaking, the *litis contestatio*, also under the Instruction *Cum Magnopere*. The specific answers to the various counts, though pertaining to the "litis contestatio," are rather its *complement* than its constituent part, and, therefore, pertain rather to its *completeness* than its essence.

322. These specifications (*positiones*, *capitula*, *articuli*) should be framed by the *litigants themselves* or their advocates, and not by the auditor or ecclesiastical judge.[3] The reason is that they are considered as *proofs*; for, if not denied by the accused, they are regarded as *admitted* or *confessed* by him, and, therefore, have the force of full proof against him. Now the proofs for or against a case must be

[1] The reason is that the *capitula* are regarded as *proofs*. Now proofs should not, as a rule, be produced until after the litis contestatio.

[2] Cap. i, ii., de Confessis in 6°; Reiff., l. 2., t. 18, n. 186, 231.

[3] Ib., l. c., n. 219.

presented by the litigants themselves, not by the judge, whose duty it is, not to *prove*, but to *judge* the case. Hence, in criminal and disciplinary causes, as conducted also under the Instruction *Cum Magnopere*, the specifications of the charge are made out by the diocesan prosecutor (*procurator fiscalis*). The accused or his advocate has the right to submit defensive specifications.

323. Nevertheless, these counts must be submitted in writing to the auditor or judge, whose right and duty it is to reject or admit them, not arbitrarily, but in accordance with the prescriptions of the sacred canons.[1] Once they have been presented to the auditor or judge, and filed by him among the acts, they can no longer be changed.[2]

324. When the specifications are properly framed and presented by the diocesan prosecutor, the accused is obliged to give a specific answer to each, provided he is commanded by the auditor or judge to answer; and if he refuses to answer without alleging a reasonable excuse, he is looked upon as having *admitted* the specifications which he declines to answer. This, however, needs explanation.

325. We say, *when the specifications are properly framed.* In what manner, then, must they be drawn up, in order that the accused may be bound to answer them? 1. They must be *to the point—i.e.*, they must bear on the crime charged; otherwise the accused need not answer. 2. They must be *clear*, not vague nor obscure. If they are somewhat equivocal, the accused has a right to ask for an explanation before he answers. 3. Each specification should contain but *one* item, not two or three. 4. They should state *facts*, but not propound questions of *law*. 5. They should be made *assertively*, not *interrogatively*. 6. Finally, they should not be *captious—i.e.*, framed for the purpose of entrapping the ac-

[1] Reiff., l. c., n. 222, sq. [2] Ib.
[3] Cap. 2 de Conf in 6°; Reiff., l. c., n. 197.

cused, and, therefore, worded in such a manner, that no matter what way he answers, he will criminate himself.[1]

326. This latter requisite was brought out in the oft-quoted case of the Priest David A., who appealed to the S. C. C. from the sentence of the *curia* of Milan. The Roman Advocate, who pleaded before the Sacred Congregation in behalf of the appellant David, showed that the specifications and questions to which David was commanded to make the categorical reply of yes or no (*credo*, or *non credo*) were captious and framed in such a manner that no matter how he answered, he would hurt his cause. Now, continued the Roman Advocate, such specifications and questions are vehemently reprobated by the law of the Church, and if put to the accused, render the proceedings *null and void*.[2] The Sacred Congregation, in April 18, 1885, reversed the sentence of the *curia* of Milan, and decided in favor of the appellant David. This decision seems thus to confirm the above argument.

327. We say also, *provided he is commanded*, etc.; for, unless the accused is commanded by the *auditor or judge in person* to answer, he can refuse to do so.[3] Finally, we say, if he refuses to answer, he is looked upon as having *admitted*, etc.; this is true only when the accused has taken the oath to tell the truth, before he answers the specifications.[4] Consequently it does not apply to our trial. For, according to the present law, the accused is not allowed to take the oath. Hence, he is not to be regarded as having admitted his guilt, if he refuses to reply to the specifications, even though the auditor or judge commands him to answer.

328. The *positiones* in civil causes of the ecclesiastical *forum* are worded thus: Ponit et probare intendit N. quod die—mensis—anni —consignavit in manus A. adversarii

[1] Reiff., l. c., n. 206; Leur. For. Eccl., l. 2, tit. 20, q. 644.

[2] Acta S. Sedis, vol. xviii., p. 65. [3] Cap. 2 de Conf. in 6°; Reiff., l. c., n. 199.

[4] Cap. 2 de Conf. in 6°; Reiff., l. c., n. 200.

libellas 50, etc.[1] The *capitula* in criminal causes are worded thus: "Inquirendum est quod N. fecit hoc vel hoc."[2]

329. *Q.* Is the *contestatio delicti*, as prescribed in the present article of the Instruction, absolutely necessary, in such a manner that its omission will cause the proceedings to be null and void?

A. We premise: There are two kinds of *litis contestatio:* one formal or solemn; the other simple and informal. The formal is that which is made *in certain set words or phrases*, contained in the formula of the respective curia. The informal is that which is made in a simple manner and without any set form of words or phrases.[3] It matters not how it is worded. All that is required is that the prosecutor shall clearly and fully set forth and affirm the offence and all its details and specifications.[4] We now answer: It appears certain that the informal *litis contestatio* is sufficient, and also, at the same time, absolutely necessary, on pain of nullity of the proceedings. That it is sufficient, follows from the fact that the trial, as outlined by the Instruction, is conducted in a summary and informal manner.[5] That it is absolutely necessary is asserted by Rota (p. 471), and is in accordance with the teaching of all canonists, as we show in our *Elements*, Vol. II., n. 1066, 1069. In fact, the *litis contestatio* is the basis, foundation, and corner-stone of the whole trial. Consequently, when it is wanting, no judicial superstructure can be raised.[6]

330. From what has been said, it will also be seen that the *object* of the "litis contestatio" is twofold: The first and chief is to fix clearly and unalterably the points at issue or the charges preferred and thus have a specific and unchangeable basis for the trial. We say, *unalterably;* for, as we have seen, the prosecutor cannot alter the charge after the *litis*

[1] Pierantonelli, l. c., p. 141. [2] Pellegr., part. iv., sect. x., n. 84.
[3] Todeschi, l. c., 507, § 15; Pellegr., l. c., p. ii., sect. ii., subs. 21, n. 2.
[4] Rota, p. 471. [5] Art. x.; cf. Schmalzg., l. 2, t. 5, n. 3. [6] Schmalzg, l. c, n. 4.

contestatio. The second object is to shorten the trial. For, as we say in our *Elements,* Vol. II., n. 1072, "if the prosecuting official, for instance, proposes ten specifications, and the defendant admits six, it will be necessary only to prove the four remaining." For fuller information regarding the *litis contestatio* and also the *capitula* or specifications of the charges, see our *Elements,* Vol. II., Nos. 1064, 1074.

§ 2. *Manner in which the Prosecutor Produces the Proofs of Guilt.—Probatio Delicti.—Processus Publicatio.*

331. After the *litis contestatio* or plea, it becomes the duty of the diocesan prosecutor to prove those charges and specifications which have been denied by the accused in the *litis contestatio.* Those which are admitted by him need evidently not be proved. The prosecutor, then, at this stage of the proceedings,[1] produces before the auditor, and in the presence of the accused, all the witnesses, documents and other evidence upon which he bases the guilt of the accused. For this purpose, he now submits as evidence or proof the entire record or minutes and acts of the proceedings which have taken place prior to the citation of the accused—namely, the testimony of the witnesses then examined *pro informatione curiæ;* the documents then submitted; the records or minutes of the proceedings—all of which is read to the accused and a copy given him, provided, however, he has previously declared that he regards the witnesses examined in the informative process as lawfully examined. Where these records are very voluminous and where, consequently, it would consume too much time to read them all to the accused, it is sufficient to give him a copy of them, or to

[1] If he is not ready, as yet, he can obtain a suitable delay to enable him to get ready. This delay is called *terminus ad producendum omnia,* because within this term the prosecutor can and should, at least as far as possible, produce all his witnesses and other evidence or proofs, that is, not only the proofs collected during the informative proceedings, but also others that he may have obtained afterwards.

allow him to inspect and, if he desires, copy them.[1] This is called the *publicatio processus offensivi* or *informativi*, as we show in our *Elements*, Vol. II., n. 855, 1120, sq. It is a substantial part of all criminal trials,[2] and is therefore also prescribed, and that on pain of nullity, by the *Instruction*, when it says: "Deinde accedendum est ad contestationem delicti, *et argumentorum, quæ prostant.*"[3]

332. We have just said, *provided he has previously declared*, etc.; for, before the informative proceedings and the proofs collected in these proceedings, are read or communicated to the accused, in the manner stated, the latter is asked whether he considers the witnesses who were then examined, in the informative process, as lawfully cited and properly examined or not. If he replies in the affirmative, their testimony becomes *legalized* by this declaration; that is, by fiction of law, it is regarded as having been taken *after* the "litis contestatio," and consequently *jam constituto et citato reo*, and having therefore the same legal force as proof of guilt, as though the witnesses had been in reality examined after the citation of the accused, and after the *litis contestatio*. In other words, the above declaration of the accused gives the testimony the force of *probatio legalis*.

333. Hence, as soon as he has made this declaration, the entire testimony of the witnesses is forthwith published to him, in the manner stated. Thus the *Third Plenary Council of Baltimore*, n. 314, explaining the present article (xxvi.) of the *Instructio*, says: "Itaque coram accusato legendæ sunt testium depositiones, et conclusiones ex illis deductæ."

334. In the second, namely, where the accused refuses to make this declaration and thus to legalize the testimony of the witnesses, as taken during the informative process, the witnesses must all be cited and examined over again (*repetitio testium*), at this stage of the trial, just as though

[1] Rota, p. 472. [2] Pellegr., part. iv., sect. x., n. 18. [3] Rota, l. c., p. 472.

they had not been examined as yet, and only when they have been examined over again after the *litis contestatio*, does the auditor or judge order the above publication to take place.

335. Here the question arises: are the *names* of the witnesses also to be communicated to the accused, together with their testimony at the *publicatio processus informativi* or *litis contestatio* in question? According to the general law of the Church, as generally interpreted by canonists, and prescinding at present from the *Instructio*, it is necessary to distinguish between two cases: 1. Where the accused legalizes the informative process, by his declaration, as explained; 2. Where he declines to make this declaration. In the first case, the *names* and *surnames*, as well as the testimony of the witnesses, must be forthwith communicated to the accused. In the second case, the *names* as well as the testimony of the witnesses need not be published to him, until after the witnesses have been examined over again, as explained already.

336. Bouix[1] gives the above teaching thus: "Peracto rei examine . . . Judex decernit publicari, et publicat processum (offensivum) huc usque peractum. Dicitur autem processus *offensivus* tota ea pars processus criminalis, quæ præcedit decretum judicis, quo reo copiam actorum concedit, ut sese defendere possit. Et vocatur offensivus, quia hucusque omnia peraguntur contra reum, ad detegendum nempe ipsius delictum; et nondum ad sese defendendum admissus est. Fit autem *publicatio*, legendo totam seriem processus hucusque habiti. . . Quamvis Judex, publicato processu offensivo, teneatur reo petenti concedere ejusdem processus copiam, non tenetur ad manifestanda ipsi testium *nomina* antequam testes repetantur; nisi reus velit processum huc usque habitum *legitimare*, id est, nisi *declaret* se

[1] De Jud., vol. ii., pp. 215, 216.

habere testes in informativo processu receptos, *pro rite et recte citatis et examinatis.*"

337. This is apparent also from the formula of this publication, as given by canonists in general, and especially by Pellegrino, l. c., P. iv., Sect. x., n. 83; Bouix, de Jud., Vol. II., p. 570.

338. The reason why the names of the witnesses may be withheld from the accused until after their testimony has become legalized either by the defendant's declaration or their repetition, as explained, is, that until the testimony of the witnesses examined in the informative process which preceded the citation of the accused, has been legalized either by the declaration of the accused (*legitimatio processus per declarationem*), or by the repetition (*legitimatio processus per repetitionem testium*), it is looked upon by the law of the Church as of no force whatever as against the accused, or as proof of his supposed guilt. In fact, these witnesses are regarded as not having given their testimony at all, as yet, against the accused.

339. If therefore their names were made known to the accused before their testimony became legalized, either by declaration or repetition, he might by persuasion, by threats, money or even violence, cause them to refuse to repeat their testimony, or at least, to tell the truth, and thus he might frustrate the ends of justice. It is to prevent this contingency or danger of intimidation or bribery, that the law of the Church enacts that the names of the witnesses need not be communicated to the accused, until after their testimony has been legalized, as above explained. We say, "need not;" for where there is no such danger, the names of the witnesses *may* be made known to the accused at any stage of the proceedings. For, while the judge *need* not, he *may*, if he wishes, communicate their names to the accused, even before their testimony has been legalized.[1] *A fortiori* the

[1] Bouix, de Jud., vol. ii., p. 570.

testimony of the witnesses, without their names, may be communicated to the accused at any stage of the trial, even before the legalization of their testimony or the *processus publicatio.*

340. The above teaching, to wit, that the names of the witnesses must be communicated to the accused, together with their testimony, in the publication of the informative process to the accused, which takes place according to article xxvi. of the *Instructio*, is also maintained by recent canonists who wrote after and commented upon the *Instructio* of the S. C. EE. et RR., dated June 11, 1880, of which the Instruction *Cum Magnopere* is a copy. These canonists apply the teaching in question to article xxvi. of the *Instructio* now under discussion. Thus Rota,[1] explaining article xxvi. of the *Instructio* of 1880,—which is the same as article xxvi. of our *Instructio*—says: "Contestatio delicti (art. xxvi.), exigit processus publicationem. . . Ast imprimis recte cognoscendum est, quæ ista publicatio requirat, et in quo præcipue consistat. . . Igitur oportet imprimis, ut reus declaret (et de hoc constare debet in actis), se habere testes pro rite et recte receptis, et legitime examinatis, salvis exceptionibus et repetitionibus quæ occurrere possint." Hac a reo emissa declaratione, et in Actis recepta, Judex debet Acta processus offensivi publicare, mandando ut omnia alta et clara voce legantur, et postea copiam ipsorum dando. . . Quæres forsan, an danda sit copia actorum, cum *nominibus et cognominibus* testium, ubi hæc reus petierit. Ad solvendam hanc questionem, opus est distinctione: vel enim agitur de reo examinato, *qui declaravit se habere testes pro rite examinatis et receptis*, vel non . . . In *primo* casu copia est concedenda omnium repertorum cum *nominibus et cognominibus* testium, ut possit non tantum contra eorum *dicta*, sed etiam contra eorum *personas*

[1] Enchir., p. 471, n. 713, 714, 715.

excipere, puta si fuerint *inimici, socii, inhabiles* etc. Patet quod hoc ad defensionem pertinet, et denegari a judice nequit."

341. In the *second* case, namely, where the accused declines to make the above declaration, Rota teaches that the names of the witnesses need not be given to him until after their testimony has been legalized by repetition.

342. In like manner, Droste,[1] having described the examination of the accused, as pointed out in article xxv. of the *Instructio*, says: The *confrontation* of the witnesses with the accused, though distinct from, is yet, as a matter of fact, connected and interlinked with the above examination of the accused. This *confrontation*, where the accused appears for the examination prescribed in article xxv. of the *Instructio*, is so essential in criminal proceedings, that its omission renders the proceedings wholly null and void,[2] and makes it necessary to begin the trial over again *ex integro*.[3] This is also indicated by article xxvi. of the *Instructio* of June 11, 1880, which says: "*Proceditur inde ad contestationem facti criminosi, et conclusionem habitarum, ad retinendum accusatum criminosum lapsumque in relativis pœnis canonicis.*"

343. Droste[4] next explains what is meant by this confrontation. In common with all canonists, he says there are two kinds of confrontation; one *personal*; the other *verbal*. After stating that it is discretionary with the judge to allow of the *personal* confrontation, he continues: "But the *verbal* confrontation is obligatory. It consists in this, that the *names* of the witnesses are read or given to the accused, together with their testimony, as also the conclusions drawn from them by the *procurator fiscalis*. It cannot be omitted; and the accused must, as a rule, be present at it, in person... This verbal or personal confrontation is called *legitimatio*

[1] P. 120, 121, Paderborn, 1882. [2] S. C. EE. et RR. litteræ circulares, 1851.
[3] S. C. EE. et RR., 1852. [4] L. c., p. 121.

processus. . . The accused has the right to attack, in every possible manner, the *person* of the witnesses, as also their testimony. This is the meaning of article xxvii. of the *Instructio*: "*Quum accusatus tali modo habeat plenam cognitionem ejus quod in actis extat contra se, ultra quod respondere possit, jure se defendendi a semetipso etiam uti valet.*" This author reiterates the same teaching on page 56 of his work.

344. The *Third Plenary Council of Baltimore*, n. 314, takes a different view, and teaches that the names of the witnesses are made known to the accused, or rather to his advocate, not at the present stage of the proceedings as described in article xxvi. of the *Instructio*, but only when the trial proper is entirely over, and when the final summing up is to take place, as described in article xxxii. of the *Instructio*. The words of the *Council*, in explaining article xxvi. of the *Instructio*, are: "Itaque coram accusato legendæ sunt testium depositiones; et conclusiones ex illis deductæ. Inquisitus, ubi ex his noverit, quæ in actis contra ipsum relata sunt, ad ea respondere potest ac, si velit, utetur jure defensionis a se ipso in scriptis peragendæ (a. xxvii.) *Nomina autem testium durante processus confectione non prodantur*, sed tantum publicato processu (*i.e.*, defensoris inspectioni submisso, juxta a. xxxii.), ut possint exceptiones contra eos fieri."

345. The inconvenience which this interpretation put upon article xxvi. of the *Instructio*, by the *Third Plenary Council of Baltimore* might cause, is that the accused or his advocate, to whom the *names* of the witnesses are revealed only at that late stage of the proceedings, would even then, as the *Third Plenary Council* (n. 314) also expressly states, have the right to except against the *persons* of the witnesses; that is, he would have the right to produce witnesses to show that the opposing witnesses were, for instance, his enemies, etc. Hence the judge would be obliged, at that late stage, to admit and examine the witnesses of the accused, and

thus, so to say, re-open the trial, after it had been already closed according to article xxix. of the *Instructio.*

346. Observe, however, that while the explanation of article xxvi. of the *Instructio*, as given by the *Third Plenary Council of Baltimore*, does not make it *obligatory* upon the auditor or Bishop to disclose the names of the witnesses, prior to that publication which takes place according to article xxxii. of the *Instructio*, *neither does it forbid* these names to be made known before this time. In other words, the explanation of article xxvi., as made by the *Third Plenary Council*, gives the judge discretionary power to reveal the names of the witnesses to the accused, either at the publication which takes place according to article xxvi., or only at the publication prescribed in article xxxii. of the *Instructio.*

347. However, from the fact that the names of the witnesses need not be communicated to the accused until after the *legitimatio processus offensivi* or *informativi*, it would be a mistake to infer that they need not be made known to him at all. For, the law of the Church, as still in full force, expressly enacts that in all criminal and disciplinary causes, "non solum *dicta*, sed etiam *nomina ipsa* testium sunt ei (reo, ut quid, et a quo sit dictum, appareat) publicanda. . . ne per suppressionem nominum infamandi audacia præbeatur."[1]

348. This is in accord with the natural law itself, since the publication of these names is necessary to a legitimate defence, guaranteed by the very law of nature. In fact, it is plainly an essential part of a legitimate defence to show that the witness of the prosecution is either actuated by personal motives, such as enmity, jealousy, revenge, or is otherwise unworthy of belief—*v.g.*, because he is known to be a liar, or given to crime, or excommunicated. The credibility of a witness depends, in the estimation of all mankind, mainly upon his character. If that is good, honorable, and

[1] Innoc. iii. Cap. Qualiter et quando 24 de accus. (v. 1) 1216.

disinterested, his testimony is worthy of belief. If it is not, his testimony, no matter how good apparently, has generally speaking, no weight. For, who will believe a person destitute of virtue, religion, morality, or honor?

349. It is, therefore, of the greatest importance for the accused to show up the character of the witnesses, and thus to overthrow their credibility. But this he cannot do, *unless he knows their names and who they are.* Consequently, it is certain that except in causes of heresy, the names of the witnesses must always be communicated to the accused or his advocate, so that he may be able to overthrow their credibleness, by producing other witnesses and proofs showing the character of the witnesses of the prosecution.

350. Nor is this rule or law to be violated even where it is feared that harm may come to the witnesses. For in most cases, this fear is imaginary rather than real. Thus, so far as regards the danger of a libel suit in the secular courts, it is certain that no witness who testifies before an ecclesiastical court, can be sued for libel or damages, in a secular court, unless it is *clear* and *notorious*, that he has with *malice prepense* given false testimony. The reason is that our secular courts recognize the laws and regulations of the Church as having the force of contracts between the Church and its members, and will enforce them as contracts freely entered into by the parties. Hence, our secular courts will not interfere with the right of our ecclesiastical tribunals to summon and examine witnesses, and the obligation of the latter to testify. Consequently, our secular courts will regard the testimony of such witnesses as *privileged* communications or acts, and will, therefore, refuse to entertain any libel suit, except perhaps where malice is notoriously shown to exist. If the latter were the case, a witness would fully deserve to be prosecuted.

351. Again, it must be borne in mind that the common good of all must be preferred to the private good of indi-

viduals. Now the common good requires that an accused shall not be deprived of a legitimate means of defence, since otherwise, no person, however innocent, could be secure against conviction or condemnation. From all this it will be seen that the names of the witnesses must always be communicated to the accused or his advocate, except in causes of heresy; that, however, this publication need not be made until after the testimony has been legalized as stated above.

352. We have just said, *except in causes of heresy:* for the law of the Church expressly excepts these causes from the above law requiring the publication of the witnesses' names, and enacts that in causes of heresy, which are tried before the Holy Office or tribunals of the inquisition, the names of the witnesses, though not their testimony, may, as a rule, be altogether withheld from the accused.[1] See our *Elements*, Vol. II., n. 1323.

In causes of *sollicitatio* also, the name of the person solicited and making the denunciation, cannot be manifested to the accused, owing to the danger of thereby causing the violation of the *sigillum sacramentale*.[2]

353. We have seen that the *processus informativus* is legalized either by the declaration or waiver of the accused, or by the repetition of the witnesses; that after the process is legalized, its publication takes place. We shall here add a few explanations respecting both the above modes of legalization and also the publication.

In regard to the legalization *by the declaration of the accused*, it must be borne in mind that even when the accused makes this declaration or waiver,[3] he nevertheless retains the full right to object both against the *persons* and the *testi-*

[1] Cap. 20, de hæret. in 6° (v. 2.)

[2] Instr. S. Officii, 1867, given in Konings, vol. I., p. lxiv.

[3] Todeschi, in his Manual, pp. 508, 509, says this declaration is now seldom or never made; but that the repetition of the witnesses always takes place. Rota (p. 472), however, says the opposite.

mony of the witnesses, and also to cross-examine them. For, by this declaration, the accused simply declares that though the witnesses were examined prior to the *contestatio delicti*, yet he consents to look upon them as though they had been examined after the *contestatio*, but not that he considers either their persons or their testimony as unobjectionable. Hence, too, he should, for greater safety, when he makes the above declaration, expressly state that he reserves to himself the full right to except against the persons and testimony of the witnesses, and also to cross-examine them.[1]

354. Concerning the legalization of the informative process *by the repetition of the witnesses*, we have but one or two explanatory remarks to subjoin here. We have said above that if the accused refuses to legalize the informative process by his waiver, the witnesses must all be examined over again. The reason is, because otherwise their testimony will have no legal force whatsoever, so far as concerns the proving of the crime.[2] For, as we have shown above, under article xix., no evidence has any legal effect, as proof, unless it is produced in court, after the *litis contestatio*, and consequently after the citation of the accused. Now the witnesses who were examined in the *processus informativus*, were produced and examined *nondum constituto nec citato reo*. Consequently it is the unanimous opinion of canonists that these witnesses, no matter how numerous, prove nothing whatever against the accused, unless they are examined over again, or the accused waives his right to have them repeat their testimony.[3]

355. There are two ways in which the witnesses examined in the informative proceedings may repeat their

[1] For the formula in which he may do this, see Pellegrino, P. iv. Sect. x., n. 79.

[2] The *Acta S. Sedis*, vol. xv., p. 394, thinks it safest always to examine the witnesses over again, after the citation of the accused and the *contestatio delicti*.

[3] Bouix, de Jud., vol. ii., p. 218.

testimony, after the *litis contestatio:* one, in the presence, the other, in the absence of the accused. The first takes place in this manner: The accused is cited and allowed to be present, not only when the witness takes the oath prior to testifying, but also at the examination itself, and to cross-examine. This is called the *personal confrontation* (*confrontatio personalis*), because the accused and witness confront each other *in person.* See our *Elements*, Vol. II., n. 839, 1117, 1122.

356. The second mode takes place thus: The accused is cited and allowed to see the witnesses take the oath before being examined, and also to except against their persons. But he is not permitted to be present at the examination itself; however, after the examination is over, the entire testimony, together with the names of the witnesses, must be communicated to him. Hence, this mode of examining witnesses is termed *verbal confrontation* (*confrontatio verbalis*), because the accused is confronted, so to say, only with the words (*verba*) or testimony of the witness. See our *Elements*, Vol. II., nos. 838, sq., and no. 1118.

357. The law of the Church, as in force at present, also with us, under the *Instruction Cum Magnopere*, allows of both modes, namely of the personal and the verbal confrontation.[1] However, usage and custom favor the *personal*, except where grave inconveniences would result from it. In fact, the mere verbal confrontation is a long, tedious, indirect and withal unsatisfactory procedure. It makes a cross-examination in the proper sense of the term scarcely possible. For the party against whom the witnesses testify being excluded from the hearing, can merely hand in his questions for cross-examination, before the beginning of the examinations. But how frame cross-questions before it is known what the witness will answer? And yet a fair and

[1] Pellegr., l. c., p. 4, 5. 11, n. 26.

full cross-examination is the best crucible of the veracity, accuracy and reliability of the testimony given by a witness.

358. Hence, the confronting of the witnesses with the party against whom they testify is at present the rule in all *secular* courts, not only of the United States, but of the whole civilized world. Thus, as Walker[1] says, "in the United States, every prisoner has a right to meet his witness face to face." After the examination-in-chief, says Hilliard,[2] or even after the witness has been sworn, but not yet examined, the adverse party has the privilege of cross-examining. And he may propose leading questions. The chief object of the cross-examination is to detect misstatements and inaccuracies.[3] This holds so strictly in our secular courts, that the testimony of witnesses has no value whatever, unless the adverse party has been allowed to cross-examine.

359. For these reasons, no doubt, the personal confrontation has been universally introduced in the ecclesiastical courts of France, and some other Catholic countries.[4] It is allowed in the United States, according to the Instructions of the S. C. de P. F. dated respectively 1878 and 1884.[5] In reality, this method, or the personal confrontation is the simplest, most natural, expedite and satisfactory mode of procedure.

360. Yet there will be cases, especially in the ecclesiastical courts, where the personal confrontation may be unbecoming, nay, even hurtful.[6] Consequently, it must be left to the conscientious discretion of the auditor or judge to permit the personal, or merely the verbal confrontation. As to the mode of procedure either when the personal confrontation or only the verbal takes place, see our *Elements*, Vol. II., n. 1118–1123.

[1] American Law, p. 727. [2] Elements of Law, p. 305. [3] Ib.
[4] Cf. Todeschi, p. 509. [5] Droste, p. 121; Rota, p. 471.
[6] Pellegrino, Part.iv., Sect. xi., n. 26.

361. However, in either case—*i.e.*, whether the personal or only the verbal confrontation takes place, the witnesses of the *processus informativus*, must repeat their testimony with all the formalities laid down in articles xvii., xviii., xix., and therefore in the same manner, in which they would be obliged to testify, if they had not testified already. In other words, they must be cited; then sworn; heard separately, etc.

362. After the *processus informativus* has been thus legalized (*legitimatio processus*), either by the declaration of the accused, or by the repetition of the witnesses, as described, the *publicatio processus* takes place, as we have seen: in other words, the entire proceedings of the informative process are communicated to the accused. In this *publicatio*, both the *names* and the *testimony* of the witnesses must be given the accused, as we have shown, so that he may be able to prepare for his defence. See our *Elements*, Vol. II., nos. 855, 1120, 1121, 1124, 1126.

363. The nature and extent of this publication is thus described by Pope Innocent III., in his constitution *Quoniam*[1] (anno. 1216): "Judex semper adhibeat publicam personam, aut duos viros idoneos qui fideliter universa judicii acta conscribant: videlicet citationes, dilationes, recusationes, exceptiones, petitiones, responsiones, interrogationes, confessiones, testium depositiones, instrumentorum productiones. *Et omnia sic conscripta partibus tribuantur.*"[2]

364. We observe that the diocesan prosecutor is at liberty to produce, after the *litis contestatio*, and before the *publicatio processus*, and within the probatory term or *terminus ad producendum omnia*, assigned him by the auditor or judge, other witnesses, documents and proofs, besides those already produced and examined in the informative process.[3]

[1] Cap. 11, de prob. (II. 19).
[2] Cf. Prael. S. Sulp., vol. iii., n. 678.
[3] Pellegr., l. c., Part. iv, Sect. ix., n. 59.

We say *before the publicatio processus informativi.* Can he also do so *after* the publication of the *processus informativi* or *offensivi?* We must distinguish between *direct* witnesses and proofs, and *rebutting* witnesses. He certainly can produce new rebutting witnesses for the purpose of breaking down the testimony of the witnesses for the defence, as we show in our *Elements*, Vol. II., n. 1132–1133, p. 253. Whether he can also produce new direct witnesses and evidence, to corroborate his charges, is controverted, some canonists affirming, others denying. Those who hold the negative, contend that the defence alone can produce such evidence, once the informative process has been published.[1] The safest course, therefore, is for the prosecutor to produce all his direct evidence *prior* to the publication of the *processus informativus.*

365. If any such new evidence is produced by the prosecutor, it must be, of course, communicated to the accused, either simultaneously with, or subsequently to the publication of the *processus informativus*, according as it is submitted by the prosecutor, either before or after the publication of the informative process. For whatever evidence or proof is advanced by the prosecution, must be communicated to the defendant for his defence. See our *Elements*, Vol. II., n. 1126, sq.

366. This communication of all the evidence of the prosecution to the defendant is a necessary condition and part of a legitimate defence, and therefore, is absolutely obligatory, even in summary trials; hence if it is omitted, the entire proceedings are null and void.[2] It is clearly prescribed by the present Instruction in articles xxvi. and xxvii.[3] See our *Elements*, Vol. II., n. 1120–1126.

367. We observe here, in passing, that there are two

[1] Pellegr., l. c., Part iii., Sect. x., n. 20. [2] Pellegr., Part iv., Sect. x., n. 8.
[3] Rota, p. 472; Dröste, pp. 56, 120, sq.

kinds of *publicatio processus:* one is the communication of the evidence of the *prosecution* made to the defendant for his defence. This is called *publicatio processus informativi* or also *offensivi* and takes place as soon as, and whenever the prosecutor has presented all his evidence after the *litis contestatio.* The other is the communication of the *entire evidence both of the prosecution and of the defence* to the prosecutor as well as the accused, to enable both parties to make their final summing up. This is termed the *publicatio totius processus, tum offensivi, tum defensivi,* or rather the *publicatio processus defensivi,* and takes place after the *conclusio in causa* in the manner laid down by the present Instruction, in articles xxxii. and xxxiii.

368. We observe, also in passing, that the auditor or judge, either in the same decree in which he orders the *publicatio processus offensivi,* or immediately afterwards, assigns the accused a suitable delay (at least, if the accused so desires,) *v.g.*, five or eight days, to prepare for, and present his defence,—*i.e.*, to produce his witnesses, documents, etc.[1] For the formula of this decree, See Pellegr., P. iv., S. x., n. 79.

[1] Cf. Pellegr., Part. iv., Sect. x., n. 79.

CHAPTER IV.

THE DEFENCE—CLOSE OF THE TRIAL.

(FROM ART. XXVII. TO ART. XXIX.)

ART. XXVII.

The Defence.—Mode of Conducting it.

XXVII. "Inquisitus, ubi ex his noverit, quae in actis contra ipsum relata sunt, ad ea respondere potest, ac si velit, utetur jure defensionis a se ipso in scriptis peragendae."

369. The preceding article discusses the manner of proving or establishing the guilt of the accused. The present and subsequent articles (xxvii., xxviii.) speak of the defence, and give an outline of what the accused can do, before the trial is ended or closed (*processus clausus*), in the manner stated in article xxix. In accordance with the general law of the Church, and the very law of nature, the present and subsequent articles give the accused the right (*a*) to be fully informed of all the charges and proceedings which are on record in the curia against him; (*b*) to answer these charges: that is, to produce counter-evidence, such as witnesses, documents, and the like.[1] This is meant by the words *ad ea respondere potest.* (*c*) Also, to present a full defence in writing, (*d*) to obtain the necessary delays, in order to enable him to prepare properly to exercise these rights of defence.

Accordingly, as soon as the legalization of the *processus informativus* has taken place, the auditor or judge, as we have shown, proceeds *at once* to publish or communicate to the

[1] Acta S. Sedis, vol. xv., p. 393

accused, the entire acts, proceedings and proofs of the *processus informativus* or *offensivus*, and at the same time grants the accused a suitable delay to prepare his defence,[1] and consequently to present all his witnesses, documents, or other evidence he may wish to produce. This delay is called *terminus ad producendum omnia*, or *terminus ad allegandum quidquid vult, ne condemnetur*, or also *terminus ad omnes suas defensiones faciendas.*"

370. When the accused thus knows all the charges and proofs that stand against him on record, he has the right, as the present article says, to defend himself—*respondere potest*. Observe here that this phrase *respondere potest* does not mean simply the right to make answers *personally*, or to make a speech or oral argument. It signifies, and is employed by canonists to signify, particularly in reference to criminal and disciplinary causes, the whole defence or the complete answer, whether by oral argument, or by witnesses, documents, etc., which the accused opposes to the charges and proofs of the prosecution.[2] The *Acta S. Sedis*, Vol. XV., p. 393, in commenting upon the Instruction of 1880, expressly interprets the clause *respondere potest*, as giving the accused the full right to produce witnesses, documents, etc.

371. This full right of defending himself, which the Instruction grants the accused, is in harmony with all laws, natural, human and divine. For, as we say, in our *Elements*, Vol. II., n. 1128, "not only positive and human, but also natural and divine law, gives the accused the right to defend himself," and therefore, imposes upon the ecclesiastical judge the obligation of granting him the fullest opportunities to make use of this right. Consequently not even the Pope himself can take away this right. For, proceeding

[1] Prael. S. Sulp., vol. iii., n. 678, p. 73.

[2] Schmalzgr., l. 2, t. 3, n. 10; Rota, p. 415.

as it does from natural law, it cannot be taken away by any power on earth. Thus Pope Clement V., says: "Nec defensionis (quæ a jure provenit naturali) facultas adimi valuisset: cum illa Imperatori (Papae) tollere non licuerit, quæ *juris naturalis* existunt."[1]

372. Wherefore the auditor or judge conducting the *compilatio processus*[2] is bound *ex officio* to give the accused the fullest right to defend himself, and to assign him a suitable term for that purpose, even though he does not ask for it.[3] Nay, the accused cannot, even though he wishes, absolutely or unconditionally renounce the right of defending himself, especially in a criminal cause where he is liable to a severe punishment; and the auditor or judge cannot allow of such renunciation, since it would be null and void. This is also plainly indicated in our *Instruction*, article xxxi., which enacts, that when the accused refuses to select an advocate for himself, the auditor or judge shall *ex officio* designate one for him. We have said *simply;* for if the accused, after being given a term to produce his defence, deliberately waives the right of defence, saying that he does so, knowing for certain that he has no defence whatever to make, then such renunciation is valid, and therefore admissible by the judge; otherwise not.[4]

374. The law of the Church goes even a step farther and enacts that even where the accused has *confessed his guilt*, he cannot be allowed to renounce his defence; but that he must be given a term to defend himself even against his own confession. This is the unanimous opinion of canonists. Thus Pellegrinus teaches:[5] "An defensiones sint reo examinato necessario dandæ, sive confessus fuerit delictum, sive non? Notandum erit, quod communis et certa conclusio Doctor-

[1] Clem. Pastoralis 2. (II. 11); Cf. Clem. Saepe, de V. S.

[2] Pellegr., Part. iv., p. 417, also uses this phrase as meaning the whole trial.

[3] Rota, l. c., p. 474. [4] Pellegr., Part. iv., Sect. x., n. 88; Rota, p. 475.

[5] Ib., n. 21.

um, nemine prorsus discrepante est, quod nemo qualiter cunque confessus in criminalibus condemnari potest, nisi prius assignetur illi terminus ad faciendas suas defensiones." The reason is that the accused can defend himself against his own confession in many ways [1]—*v.g.*, by showing that it was extrajudicial; or made inconsiderately, or under fear, compulsion, or other undue pressure or excitement.

375. Finally the law of the Church favors the right of defence to such a degree, (*a*) that the accused must be allowed to produce witnesses, documents and the like, in his own defence, even after the case is closed, nay, even after condemnatory sentence has been already passed upon him: and if he is found innocent, even at this stage, the execution of the sentence must be stopped; (*b*) that witnesses who are not free from objection and are not altogether trustworthy, and who consequently cannot be produced by the prosecution, may yet be produced by the defence to disprove the charge; (*c*) that while laics cannot, as a rule, testify against ecclesiastics and for the prosecution, they can do so for the defence; (*d*) that while, especially in criminal causes, the testimony of men is preferable to that of women, this does not hold where the testimony of men is against and that of women for the accused; since, in this latter case, the testimony of women should be preferred to that of men. [3]

376. Having shown that the accused has an inalienable right to defend himself, let us now see *in what this right consists.* It is plain that the chief way of defending one's self, consists in overthrowing the arguments, proofs, etc., which have been brought forward by the prosecutor to establish the guilt. Now the force of these proofs—*v.g.*, of the testimony of the witnesses for the prosecution, cannot be broken by the mere contrary assertion of the accused, but rather by witnesses, documents, or other proofs which show the con-

[1] Pellegr., Part. iv., Sect. x., n. 22. [2] Ib., n. 74. [3] Ib., n. 75, 76, 77.

trary. The right of self-defence, therefore, means that the accused has the right to produce and the auditor or judge the duty to receive and examine all witnesses, documents and other proofs which are adduced by the defence, and which can, in any way, weaken or break down the proofs adduced by the diocesan prosecutor.[1]

377. Nay, the auditor or judge is obliged *ex officio* to admit not only those witnesses and documents, which are produced by the accused, but also all others, whom he may know to be conducive to the defence, even though they are not submitted by the defence. This is the teaching of canonists,[2] and is clearly confirmed by our Instruction, when it says, in article xi.: "Processus ex officio instruitur. . . et usque ad terminum perducitur eo consilio, ut omni studio ac prudentia *veritas* detegatur, ac tum de reitate *vel innocentia* accusati causa, eliquetur."

378. Having seen what is included in the right of self-defence, we shall now discuss the manner in which the defence is conducted. As we explain this subject fully in our *Elements*, Vol. II., Nos. 1128–1134, we shall here but give an outline of what we there discuss. After the prosecution rests and the whole proceedings have been communicated to the accused, as above stated, the auditor or judge assigns the accused a term for the defence—*i.e.*, a suitable time for producing all his witnesses, documents, and the like.[3] Thereupon the accused, either in person or through his advocate, draws up and presents to the auditor a written outline of the defence, setting forth its heads (*articuli defensorii*) and promising to produce the requisite witnesses, documents, etc.[4]

379. On the day appointed for the opening of the defence,

[1] Bouix, de Jud., vol. ii., p. 222. [2] Pellegr., Part. iv., Sect. x, n. 72.

[3] Bouix, de Jud., vol. ii., pp. 570, 578.

[4] For the formula of this outline, see our *Elements*, vol. ii., n. 1130, and also Bouix, de Jud., vol. ii., p. 579, or also Pellegrinus, p. 411.

the accused or his advocate should produce his witnesses, one by one, and also all other evidence by which he wishes to establish his innocence. The witnesses are examined in the manner already described, and also explained in our *Elements*, l. c., Nos. 1132–1133. After the accused has produced all his witnesses and other means of defence,[1] he can also hand in a complete written defence, covering the entire case.[2] He can, if he wishes, obtain a suitable delay to enable him to prepare this written defence with great care.[3]

380. To all this evidence submitted by the defence, the diocesan prosecutor can reply—*i.e.*, submit rebutting testimony: and consequently he can produce new witnesses, documents, etc., in order to rebut the defence of the accused.[4] These new proofs must be communicated to the accused, who can, in turn, answer, and produce further evidence or witnesses, etc. The last presentation of proofs is alway made by the accused.[5] If the parties—*i.e.*, the prosecution and the defence—desire it, they must be given a suitable delay to enable them to produce this rebutting evidence. This delay is called *terminus ad dicendum contra producta*, as we shall presently see. See our *Elements*, Vol. II., n. 1133–1141.

381. Finally, when the accused or his advocate has exhausted all the means of the defence at his command, and moreover expressly declares that he has no further defence to make, the auditor or judge closes the case (*conclusio in causa*), as we shall explain in our next article. After the close of the case, the accused can produce any new or additional evidence he may possess,[6] although the prosecutor cannot, as we shall see.[7] After the auditor has closed the

[1] Instr., art. xxvii. [2] Ib., art. xxvii. [3] Ib., art. xxviii.

[4] Cf. Schmalzg., l. 2, t. 20, n. 122, sq.

[5] Bouix, de Jud., vol. ii., pp. 583, 584; R. de M. Instit., vol. ii., p. 498.

[6] Pellegr., Part. iv., Sect. xiii., n 1.

[7] Ib., Sect. xii., n. 2; Instit., R. de M., vol. ii., p. 498.

case and made a synopsis of it, the *publicatio totius processus tum offensivi et defensivi* takes place as enacted in articles xxxii. and xxxiii. of the Instruction: in other words, all the acts of the case, and the entire evidence, both of the prosecution and of the defence, together with the résumé of the auditor or judge, is communicated to the parties, or rather submitted to the inspection of both parties, namely, the diocesan prosecutor and the accused or his advocate, to enable them to prepare for the summing up of the case, as we shall explain below, under articles xxxii. and xxxiii.

Art. XXVIII.

Delays Given During the Trial.

XXVIII. "Potest etiam, si postulet, obtinere ut terminus ad defensionem scripto exhibendam praefigatur: maxime si ob ea quae art. xxviii. indicata sunt, responsionem ad accusationes contra se latas parare non potuerit."

382. We have just seen that according to article xxvii. of the *Instruction*, the accused can obtain a suitable term or delay (*terminus, dilatio*) to enable him to prepare his written defence. Here, then, it is proper to say a few words respecting the various delays which must be granted in trials, also according to the present *Instruction*. According to all canonists, there are four necessary or substantial delays,[1] namely: first, the term assigned to the diocesan prosecutor to frame his specifications or various counts of the crime (*terminus ad articulandum* or *capitulandum*); second, the term or delay given to the accused, to prepare and make categorical answers to the above specifications (*terminus ad dicendum contra articulos* or *capitula*); third, the delay assigned to the prosecutor to prove the charges and specifications, and therefore to produce all his witnesses and other proofs, and likewise the delay given to the accused to produce counter-

[1] Pellegr., l. c., p. 117, n. 31, 32.

proofs, such as witnesses, documents, and consequently to make his defence. This third delay, whether given to the prosecutor or the defence, is equally called *terminus ad producendum omnia*, because both parties are required to produce all their proofs—*i.e.*, witnesses, documents, etc., within the term respectively assigned them. The fourth term is called *terminus ad dicendum contra producta*, and is that which is assigned both to the prosecution and the defence, in order to overthrow the proofs submitted by the adversary in the third term.

383. These terms are called *substantial* (*termini substantiales*), because they must be granted *on pain of nullity of the whole trial*, in all criminal and disciplinary trials, even though conducted *modo summario*,[1] and consequently also in our trials, as is expressly taught by Rota,[2] the Acta S. Sedis[3] and Pierantonelli,[4] in their commentaries on the Instruction S.C. EE. et. RR. of 1880. Therefore, the auditor or judge, also with us, has no power whatever to refuse to grant these terms or delays. Nevertheless he has power to shorten or lengthen them; to give the third and fourth successively instead of simultaneously to both parties; that is, to assign first a term for the diocesan prosecutor to produce his proofs, etc., and then a later term to the defence, instead of assigning the same term to both.[5] In other words, each of these two terms may run either simultaneously or consecutively for both parties. For, so far as concerns the length of the terms, or their succession, etc., a great deal depends upon the prudent discretion of the judge or auditor, and the mutual agreement of the prosecutor and defendant.[6]

384. It will be seen that the first and second terms refer to the *litis contestatio;* the third and fourth to the proofs of the prosecution and the counter-proofs of the defence.[7] This

[1] Clem. Sæpe 2 de V. S. [2] P. 476. [3] Vol. xv., p. 393, sq. [4] P. 140, sq.
[5] Arg. Clem. Sæpe 2, de V. S.; Pellegr., l. c., p. 119, n. 3.
[6] Pierantonelli, p. 144; Rota, l. c., p. 476. [7] Pierant., Ib., p. 143.

order of terms, however, is not to be understood in the sense that the proofs of exceptions which either quash the charge of the diocesan prosecutor altogether, or at least transfer the case to some other time, place or judge, or that those proofs which decide the case forthwith and without any further proceedings, are not to be produced in the very beginning of the trial, or at whatever time they may be ready for production.[1] For fuller information regarding judicial delays, see our *Elements*, Vol. II., Nos. 1078, 1093.

Art. XXIX.

Close of the Trial and Résumé of the Auditor.

XXIX. "**Absoluto processu redactor actorum summarium pracipuorum argumentorum, quae ex ipso elucent, conficiat.**"

385. When the trial is over (*absoluto processu*), that is, when the accused, having been fully and freely allowed to produce all his witnesses, documents and other proofs, declares that he has no further testimony or evidence to offer in his own behalf, and when, moreover, the auditor or investigating judge himself is of opinion that the trial is complete and that no further investigation is needed, he closes the case or trial, and proceeds to make a synopsis (summarium) of the principal arguments, witnesses, documents and other proofs submitted on both sides during the trial.[2]

386. Here we deem it proper to make two remarks: The first is that the closing of the case or trial (*Conclusio in causa*) by the auditor is not taken as a *conclusio in causa* in the proper and strict sense of the word. For by the closing of a cause, strictly speaking, is meant the act of both the contending parties declaring that they have no further testimony to submit in the case, and thus giving up their right to produce any more evidence, exceptions or defences.[3] Conse-

[1] Pierantonelli, p. 143. [2] Droste, p. 123.

[3] Arg. cap. *cum dilectus;* Pellegr., Part.ii., Sect. ii., subs. xii., n. 3.

quently the effect of such a closing of a case is that, as a rule, no further testimony whatever can be produced, either by the plaintiff or the defendant.[1]

387. Now the closing of a case in this strict sense can take place only in civil causes falling under the ecclesiastical forum, but not in criminal and disciplinary causes. For, as we have seen, in criminal and disciplinary causes, the accused has the right to produce and submit additional witnesses and proofs at any time, before the final sentence is pronounced, nay, even after it has been pronounced,[2] and that (*a*) either for the purpose of weakening or overthrowing the evidence adduced by the prosecutor, during the trial; (*b*) or of establishing *new points* (*articuli novi, capitula nova*) showing his innocence.

388. We say first, *for the purpose of weakening*, etc. Thus where, for instance, the names of the witnesses are communicated to the accused or his advocate, only at the *publicatio processus*, as prescribed in article xxxii. of the *Instruction*,[3] the accused or his advocate has the fullest right to produce, even at this stage of the proceedings, new witnesses and evidence to show the witnesses of the prosecution are perjurers, liars possessed of a bad reputation, or are enemies of the accused, or in some other way disqualified.

389. We say secondly, "or of establishing *new points;*" for the accused has the right, after the close of the trial, to produce any new testimony he may possess, in proof of his innocence. The prosecution, however, cannot, after the close of the trial,[4] produce any additional witnesses or proofs against the accused,[5] save for the purpose of answering the new witnesses or proofs adduced by the defendant, after the

[1] Our Elements, vol. ii., n. 1348.

[2] Pellegr., l. c., n. 7; Bouix, de Jud., vol. ii., p. 223, n. 7.

[3] Cf. Conc. Pl. Balt. iii., n. 143. [4] Instr., art. xxix.

[5] Arg. Cap. 6. de prob. (ii. 19); Cap. 17 de test. (ii. 20).

close of the trial, to establish *new points* in support of his innocence.[1] This principle of law was clearly brought out in the oft-quoted famous case of the Rev. David A. of Milan, decided by the S. C. C. on April 18, 1885. This Sacred Congregation, to which David had appealed, reversed the sentence of the curia of Milan, by resolution dated Dec. 20, 1884. Thereupon the prosecutor of the Diocese of Milan asked the Sacred Congregation for a new hearing on the ground that he could and would produce additional witnesses to prove David's crime.

390. The Roman advocate of David opposed the new hearing on several grounds, and among others, on the ground that after a criminal and disciplinary case is closed (*post conclusionem in causa*) the prosecutor cannot produce any additional witnesses or proofs, though the accused can. For if the case were different, the *prosecution* would easily be turned into a *persecution*. The Sacred Congregation decided, on the 18th of April, 1885, in favor of the accused, and thus, according to the *Acta S. Sedis*, confirmed the above principle and applied it to trials conducted according to the Instructions of 1880 and 1884.[2]

391. Our second observation refers to the nature and contents of the auditor's résumé. This synopsis should first state briefly, though clearly, all the steps or judicial proceedings that have taken place, such as the *processus informativus*, the citation, repetition of witnesses, etc., in order that it may appear, so to say, at a glance, that the prescribed judicial formalities were observed.[3] Next, it should briefly give or review the evidence, both of the diocesan prosecutor and of the accused, in this manner: *first* the auditor reviews the proofs submitted by the prosecutor, and states what conclusions would seem legally to follow from them. Then

[1] Pellegr., Part. iv., Sect. xii., n. 2. [2] Acta S. Sedis, vol. xviii., p. 72.
[3] Pellegr., l. c., Part. ii., Sect. ii., subs. 14, n. 1, sq.

he likewise goes over the testimony produced by the defence and shows whether and how far, according to law, it breaks down the prosecution's evidence.

392. We say, *what conclusions seem legally to follow;* for the auditor should not give his own personal opinion for or against the accused. He should merely state, and that with the utmost impartiality, the legal conclusions,—or the conclusions warranted by law—which appear to follow, on the one hand, from the proofs submitted by the prosecution, and on the other, from those produced by the defence. He should, therefore, give the same impartial consideration to the proofs of the defence as he gives to those of the prosecution.

393. Thus it will be seen that our *summarium* resembles the *restrictus juris et facti* always made out by the secretary of the respective sacred congregations in Rome or by an auditor appointed to take evidence, prior to the day fixed for the decision of the case. For, whenever a case is to be decided by any of the sacred congregations, it is the custom of such congregation to have the evidence in the case taken and a synopis or *restrictus* of it drawn up, either by its respective secretary or by some other official, usually called judex relator. This document is printed and distributed among the Cardinals composing the congregation, eight days before the general meeting takes place in which the case is to be decided.[1] This *restrictus*, like our *summarium*, should merely state the facts and proofs as presented by both litigants and the legal deductions flowing from them, but not the personal views of the *judex relator* or secretary. It will also be seen that the *summarium* resembles the opinion or the verdict given by the commission of investigation according to no. 9 of the Instruction of 1878.

[1] Bangen, The Roman Curia, l. c., 169.

CHAPTER V.

THE SUMMING UP, AND THE FINAL SENTENCE.

(FROM ART. XXX. TO ART. XXXVI.)

ART. XXX.

The Defendant's Advocate—Appointment, Rights and Duties.

XXX. "Qua die causa proponetur, inquisito fiet facultas defensionem suam per alium sacerdotem suo nomine in scriptis exhibendi. Quod si idoneum non reperiat, laicum Catholicum adhibere potest. Quisque autem ex iis ab Ordinario approbandus est."

394. In the preceding articles, the Instruction gives the manner in which the trial is conducted from its beginning to its end, so far as the taking of evidence on both sides is concerned. In the present and five succeeding articles, it treats of the final sentence, which is pronounced at the end of the trial. As we have already seen under article xii., the trial, or *compilatio processus*, as described thus far, is usually conducted by one person—namely the auditor, while the sentence itself or final decision is given by another, namely the Bishop or his Vicar-general.

395. Lest the Bishop or Vicar-general should fall into the danger of acting without mature consideration and full information, in a matter fraught with such grave consequences for the accused, he is obliged, before proceeding to pass the final sentence, to notify and cite both the prosecutor and the accused or his advocate to make their final arguments or summing up in the case (*monitio* or *citatio ad allegandum in jure et in facto*), and thus to inform him finally and fully of the case. This right of making the final sum-

ming up, prior to the passing of sentence, is, so far as the accused is concerned, *jure divino et naturali.* For it is plainly a material part of a just defence, as will be seen better a little further on. Hence the accused must, on pain of nullity of the proceedings, be cited to make this final argument and given a proper term or delay to prepare it.[1]

396. Consequently this right is also guaranteed by the present *Instructio*, in articles xxx. to xxxiv. Hence, after the case has been closed in the manner explained under the foregoing article, a suitable term or delay is assigned to the prosecutor and the defence, by the Bishop or Vicar-general (not by the auditor, since his duties end as soon as he has given in his synopsis), within which they may prepare and present their summing up of the whole case. The manner in which this final pleading must be made, will be described below under articles xxxii., xxxiii.

397. The present article says that the accused has the right to make this final summing up—which the *Instructio* justly calls *defensionem suam*, for it is, as we have observed, a material part of a just defence—through an advocate, who is a priest, or in default of a learned priest, through a Catholic layman. The words of the *Instructio* are: "Inquisito fiet facultas defensionem suam per alium *sacerdotem* exhibendi. *Quod si idoneum non reperiat, laicum Catholicum adhibere potest.*"[2] Herein the Instruction *Cum Magnopere* differs somewhat from the *Instructio* of the S. C. EE. et RR., dated June 11, 1880. The latter allows the accused liberty to

[1] Pellegr., Part. iv., Sect. xv., n. 2.

[2] Art. xxx.; Cf. Conc. Pl. Balt. iii., p. 291. At the conferences held at Rome in 1883, some of our Prelates requested that lay advocates should be excluded, and also that no *oral* summing up should be permitted. The Cardinals replied to the first request that the right of defence was already restricted in part, by the fact that the *Instructio* provides that the advocate shall be *approved* by the Bishop: to the second, that only a *written* summing up should be allowed, and that consequently the *Instructio*, which in its first draft admitted of an *oral* summing up, should be modified so as to permit only a written summing up.

choose equally either a priest or a layman for his advocate. Thus it says in art. xxx.: "Est in facultate accusati faciendi se repræsentare et defendere ab alio sacerdote *aut laico patrocinatore*." The Instruction *Cum Magnopere* restricts this liberty of choice in such a manner, that the accused can select a Catholic layman for his advocate, *only when he does not find a competent priest,* who will act as his advocate.

398. However, the *Third Plenary Council of Baltimore*, n. 302, by express authorization of the Holy See, interprets article xxx. of the *Instructio* in this sense: "Defensorem, *qui semper sit vir ecclesiasticus,* ut S. Congregatio, petentibus Episcopis, expresse declaravit, sibi eligendi accusato jus est." The *Third Plenary Council*, n. 302, adds: "Judex tamen electum (defensorem) *ex justa causa* recusare, et alterius a se approbandi substitutionem exigere potest." For the *just causes* which authorize the Bishop to reject the advocate selected by the accused, see our *Elements*, Vol. II., n. 769.

399. Here, then, it may be asked: Is the accused allowed to be assisted by an advocate, not merely at the final summing up, but also during the trial which precedes the final summing up? The reason of the question is that the *Instructio*, by expressly allowing the accused to have an advocate for the summing up, would appear tacitly to exclude him at all the other proceedings. However, a closer examination of the present article (xxx.) of the *Instructio* will show that this inference is incorrect. For, what does the article say? "Qua die causa proponetur, inquisito fiet facultas defensionem suam *per alium sacerdotem suo nomine* in scriptis exhibendi," which translated, means: The accused has the right to make his summing up or final defence *through* an advocate. In other words, he can be *replaced*, not merely *assisted* by his advocate, in the summing up and final sentence. Hence the accused can appear and act by *proxy* and need not appear in *person*, at this stage of the pro-

ceedings. Thus the *Third Plenary Council of Baltimore* (n. 315), commenting on this article, justly says: "Reus igitur ipse comparere non tenetur, sed potest." His counsel appears and acts for him. Consequently the advocate himself and not the accused signs the written summing up.

400. From this it follows indeed by the argument *a sensu contrario*,[1] that in the trial which is outlined in articles xxv. to xxix. of the *Instructio* and which *precedes* the final summing up, the accused cannot, as a rule, *be absent* and *appear merely by his advocate*, but that he must appear *in person;* that therefore he must obey the citation *in person*, that in the examination and subsequent *litis contestatio*, he must answer *in person;* that he must sign the written defence, which he makes in accordance with articles xxvii. and xxviii., *in person;* in a word, that in all the acts and proceedings which make up the *compilatio processus* or taking of evidence, he cannot be absent, and appear, answer or act, merely by proxy, but that he must be present and answer in person.

401. But it does not follow that the accused, while obliged to appear in person during the trial, cannot be *accompanied* and *assisted* by an advocate. For according to the rules of interpretation, given by canonists, the *Instructio* must be interpreted according to the general law of the Church, except where the contrary is expressly stated. This holds especially in so odious a matter as the restricting of the right of defence.

Now the law of the Church clearly distinguishes between the right of the accused to be *assisted*, when present in court, and that of being *represented* when absent. And while it authorizes the ecclesiastical judge to refuse, in certain causes or at certain stages of the trial, to allow the accused to be absent and to appear merely by proxy, or by his advocate.

[1] Reiff., l. c., t. 2, n. 406.

it always requires him to permit the accused, when he appears in person, to be accompanied and assisted by an advocate, and that during the *entire* trial, that is, from the citation of the accused to the final sentence. See our *Elements*, Vol. II., Nos. 754, 755, 757, 761, 774.

402. This principle of law was fully confirmed and applied to our country, by the S. C. de Prop. Fide, in its answer *ad Dubia* respecting the Instruction of July 20, 1878. See our *Elements*, Vol. II., p. 424.

403. Consequently, it is certain, that where the Instruction of 1878 is still in force by Papal dispensation, the accused can be accompanied and assisted by an advocate, during the entire trial, and also *represented* or *replaced* by him in the final summing up.[1] Wherefore, if this right were curtailed in the present *Instruction*, it would have to be said that in the larger dioceses where the present *Instruction* obtains, the status of the defendant would be worse than in the smaller and less favored dioceses, where the Instruction of 1878 is still in force.

404. Again, as we have shown, one of the aims of the present *Instruction* is to provide a means, which would be adequate in every respect, to stop complaints of defendants. Thus the *Instruction* says: "Cum magnopere hujus S. Concilii intersit in ecclesiasticis judiciis eam methodum servari, quae. . . . quærelisque reorum præcavendis par omnino sit." But, would not the accused have a just cause of complaint, if he were denied the right to be accompanied and assisted by an advocate, not merely at the final summing up, but also during the whole trial? Finally, the *Instruction* nowhere expressly takes away this right, but seems rather to grant it in article xxvii. when it says: "Inquisitus ubi ex his noverit . . . *ad ea respondere potest*, ac, si velit." . . . For, according to canonists, the terms *respondere*

[1] Cf. Instr. *Cum Magnopere*, art. xii.

potest mean the entire right of defence. Now all canonists maintain that this right essentially includes the right to be assisted by an advocate.

405. Hence the unanimous teaching of canonists that the accused can be accompanied and assisted by an advocate from the very beginning of the trial to its end,[1] does not appear to be curtailed by the *Instructio.*

A learned theologian, however, whom we have consulted, thinks differently, and holds that no advocate need be admitted, even to *assist* the accused, until the summing up of the case, which takes place according to articles xxx., xxxiv. of the *Instruction.*

406. These principles are set forth with remarkable clearness in the Instruction for the arch-diocese of Prague, 1869, on the mode of procedure in ecclesiastical trials.[2] Thus, article xvii. of this Instruction says: "The parties (namely, the plaintiff and the defendant) have the right to make use of and be assisted by an advocate learned in the law, during the trial, to consult with him, to have the requisite papers or documents made out by him, and to be *accompanied by him, during the trial or the hearing of the cause.* Yet all the papers handed in by a party (*v.g.*, by the accused) must be signed by such party himself; and the latter must also give his answers in person; and no regard shall be paid to answers made by the advocate. Nevertheless, the party can always consult with his advocate, before giving an answer. Should the advocate act obstreperously so as to disturb the proceedings, the investigating judge (*i.e.*, the auditor conducting the *compilatio processus*) can cause him to be excluded from the proceedings."

407. The other principle, to wit, that a party cannot ap-

[1] Cf. Bouix, de Jud., vol. ii., p. 570.

[2] This Instruction bears a striking resemblance both to the Instruction S. C. EE. et RR., June 11, 1880, and to the Instr. *Cum Magnopere,* and appears to have served as a model for them.

pear by proxy at the trial is thus enunciated in this Instruction, art. xviii.: "That a party (the accused) may be *represented* by a procurator or an advocate, without appearing *personally* in court . . . can be allowed by the court, only for grave reasons."[1] See also article lxvi. of the same Instruction,[2] where the above rules are expressly applied to the advocates of the accused, in criminal proceedings.

Art. XXXI.

When is the Judge Bound ex officio *to Appoint an Advocate for the Accused?*

XXXI. "Si vero reus defensorem deputare recuset, Ordinarius illum ex officio designabit."

408. The accused can, as we have seen, select as his advocate any worthy and learned ecclesiastic, either of the same or of a different diocese. The nomination is subject to the Bishop's approval. Where, however, the accused declines to choose an advocate, either because he considers himself capable of conducting his own defence, or because he does not regard the case of sufficient importance, or looks upon the defence as useless, or is too poor to pay an advocate, the court will appoint one *ex officio*,[3] as the present article directs.

409. This enactment is in full accord with the common law of the Church. Thus the Roman or civil law, as adopted by the Church, enacts: "Si (partes) non habebunt advocatum, ego (Prætor, Judex) dabo."[4] The reason of this law is, as we have seen, that the judge is bound *ex officio* to do all in his power to procure a full defence for the accused, and therefore, also to assign him an advocate, when he himself fails to select one, and is careless in the

[1] Apud Droste, p. 170. [2] Ib., p. 179. [3] Cf. Droste, p. 125.
[4] L. 1, § 4, ff. de Postul.; Cf. Perezii Prael., in l. 2, Cod t 7, de advoc. n. 6.

management of his defence. In regard to the Bishop's approval of the advocate chosen by the accused, see our *Elements*, Vol. II., n. 769. For fuller information concerning the rights and duties of advocates, see our *Elements*, l. c., Nos. 766–781.

Art. XXXII.

Rights and Duties of the Defendant's Advocate, in the Summing up of the Case.

XXXII. "Defensor debitis sub cautelis in cancellaria curiæ processum ejusque summarium inspiciet, ut reum tueatur: ac defensionem ante causæ ipsius propositionem scripto exhibebit. Ipse quoque ad juramentum de secreto servando tenetur, quando judex indolem causæ id postulare censuerit."

410. This article describes the duties of the defendant's advocate in relation to the summing up of the case for the accused, or the *allegare in jure et in facto.* Moreover, the present and succeeding articles define the manner in which these final arguments are to be made. According to the general law and the universal practice of ecclesiastical courts, the two parties, that is, the prosecution and the defence, have a right to make their summing up, *both orally and in writing.* This appears also from the wording of the formula by which the ecclesiastical judge cites the parties to make the summing up. The formula reads thus: "Rmus Dominus V. G. monuit ambas partes ad deducendum quidquid volunt et possunt, *tam verbo quam scriptis*, et tam in jure quam in facto. . ."[1] Thus also the Instruction of the S. C. EE. et RR., of June 11, 1880, expressly gives the advocate of the accused the right to make the summing up or final defensive arguments, first in writing,[2] and then orally, or by speech before the court.[3]

[1] Pellegr., Part. ii., Sect. ii., subs. 13, n. 11; idem, Part. iv., Sect. xv., n. 29.
[2] Art. xxxii.
[3] Art. xxxv.

411. Originally the present Instruction for the United States, as presented by S. C. de Prop. Fide, to our Prelates assembled in Rome in November, 1883, was identical, in this respect, as in fact in all other respects, with the Instruction of 1880, and therefore, allowed both the oral and written summing up for the defence. But the *oral* summing up was objected to by some of our Prelates, at these Roman Conferences, chiefly on the ground that if advocates, lay or clerical, were permitted to appear personally in the Bishop's court to make the final defence *orally* or *by speeches*, there would be danger that gradually an odious class of ecclesiastical advocates would arise in the United States whose interest it would be to multiply litigations and protract them "ad indefinitum." In deference to these objections, the Holy See changed articles xxxii., xxxiii., xxxiv., and xxxv. of the *Instruction*, in such a manner as to allow only of the *written* and not of the oral summing up.

412. Accordingly the present article enacts that the defendant shall make his summing up or final defensive arguments *in writing* only, and that he shall present it to the judge, before the day on which the sentence is to be pronounced. For the purpose of enabling him to make this final defence cover the whole cause, the *Instruction* gives the defendant's advocate the right, not only to inspect or copy, at the diocesan chancery, the whole trial and the synopsis of the auditor, but also the right to secure a copy of the final summing up of the diocesan prosecutor, as we shall see in the next article.

413. From this it will be seen that while our *Instruction* does away with the oral summing up, it does not infringe upon any material right of the accused. For, it simply enacts, that what can be done orally, according to the general law of the Church and the Instruction of 1880, shall be done in writing with us. Thus, as we have shown, according to the general law of the Church and the Instruction of 1880,

the advocates, besides handing in a written summing up, can also make final speeches or an oral summing up, and that in this order: first the prosecutor or his advocate speaks: next the accused or his advocate, having heard the prosecutor's speech, addresses the court.[1] Now, in the Instruction for the United States, the defendant is expressly allowed, nay, his advocate is enjoined, to hand in a written summing up, just in the same manner as provided in the general law of the Church and in the Instruction of 1880. But instead of the *oral* summing up by the prosecutor, and the *oral* reply or summing up by the defendant's advocate, our *Instruction* enjoins that the prosecutor shall merely make a *written argument* and the defendant a *written reply*.

414. Here we observe that in this summing up, as in the trial itself, the accused or his advocate must always be allowed to have the last word or to make the last reply. Hence the *Instruction* also enjoins that the written summing up of the prosecutor shall be communicated to the advocate of the accused, in order to enable him to reply and thus to have the last word. See our *Elements*, Vol. II., Nos. 1134, 1142, 1348.

Art. XXXIII.

The Summing up by the Diocesan Prosecutor.

XXXIII. "Processus ejusque Summarium ad procuratorem fiscalem mittitur, ut officio suo fungi possit. Postquam procurator fiscalis suas conclusiones ediderit, eædem defensori rei communicandae sunt ut ad easdem si placuerit in scriptis respondeat; tum omnia ad Ordinarium remittuntur qui, ubi in plenam causae cognitionem devenerit, diem constituet, in qua sententia dicenda sit."

415. We have seen in the preceding article that the accused or his advocate has full access to all the documents of the trial at the episcopal chancery, to enable him to prepare

[1] Cf. Pellegr., l. c., n. 13; Droste, l. c., p. 126.

for the summing up or final defence. The present article grants the same right to the diocesan prosecutor, and consequently ordains that the whole trial and the synopsis of the auditor or investigating judge shall be sent to him, so that he may be able to make up his final arguments in writing. The present article furthermore enacts that the summing up of the prosecutor shall be sent to the defendant's advocate, so that the latter may reply. Finally, when the defendant's advocate has handed in his written answer to the prosecutor's final argument, all the acts of the whole cause—namely the trial, the auditor's summary, the summing up both of the prosecution and the defence, shall be remitted to the Ordinary, so that he may examine them thoroughly and thus be prepared to pronounce a just sentence. After the Ordinary has carefully and maturely weighed all the documents and thus obtained a complete knowledge of the case, he fixes a day for the sentence, notifying the prosecutor and the accused, or his advocate, to that effect.

416. We have already, in the foregoing article, explained all these steps or proceedings. Here it remains but to say a few words respecting the tenor, contents and form of the summing up, whether of the prosecution or of the defence. The summing up is called *allegare in jure et in facto*.[1] Now the phrase *allegare in jure et in facto*, means nothing else than to show that the facts in the case (*allegare in facto*), that is, the proofs produced during the trial, and the law bearing on these facts or proofs (*allegare in jure*), fully establish either the guilt or the innocence of the accused. Of course the prosecutor's summing up will endeavor to prove the guilt of the accused; that of the accused his innocence. It is therefore the duty of the advocate summing up, to review the entire evidence and all the facts brought out at the trial,

[1] Pellegr., l. c., pp. 147, 436.

and to show how the evidence and facts are to be construed in the light of the law, and how they show either the innocence or guilt of the accused. Above all, should the advocate of the accused bestow the greatest care upon the preparation of his summing up. He should therefore go over the whole trial; carefully analyze all the evidence, and endeavor to demonstrate the innocence of his client. Hence this summing up for the defence is justly called by canonists, the final defence—*ultima defensio*,[1] and by the *Instruction*, simply *defensio*. And it is an integral part of a just defence, as we say in our *Elements*, Vol. II., no. 1142.

Art. XXXIV.

The Final Sentence.—Its Form and Tenor.

XXXIV. "Praestituta die, ab Episcopo vel Vicario generali praesente procuratore fiscali et defensore sententia pronunciatur, ejusque pars dispositiva Cancellario dictatur, expressa mentione facta, si damnationi sit locus, sanctionis canonicae quae contra imputatum applicatur."

417. When the Ordinary has fully weighed the entire case, he appoints a day for the final sentence and notifies the prosecutor and the accused, or his advocate to that effect, as we have seen in the preceding article. On the day appointed, he pronounces the final sentence, in presence of the prosecutor, the defendant's advocate, and the chancellor. Where the common law and the Instruction of 1880 obtain, both parties make their oral summing up on the day set apart for the sentence, and that immediately before the sentence is pronounced. With us, however, no such oral summing up takes place, as has been shown. Hence on the day fixed for sentence, the judge simply pronounces the sentence.

418. The sentence must be either condemnatory or absolutory. Whenever the guilt of the accused has not

[1] Bouix, de Jud., t. 2, p. 224, 586.

been juridically proved, he must be declared completely innocent, that is, he must be simply absolved,[1] and all the acts of the trial must be entirely destroyed.[2] As to the indemnity to be paid to the accused in this case, we shall explain the matter later on.

419. Where the sentence is condemnatory, it must first state clearly and explicitly the chief reasons on which it is based;[3] in other words, it must set forth the particular crime, or the specific criminal acts, on account of which the punishment is inflicted;[4] otherwise the sentence is null and void.[5] Next, it must expressly give the *sanctio canonica*, that is, the ecclesiastical law or enactment authorizing the infliction of the punishment, as we show more fully in the Third Volume of our *Elements of Ecclesiastical Law*.[6]

420. Third, the judge must necessarily pronounce the sentence, *not according to his own private and extrajudicial information*, but only according to *the evidence produced at the trial*, or as canonists say, *secundum allegata et probata*.[7] This is plain from article xvi. of the present *Instruction*, which requires legal or canonical proof for conviction. Now the sacred canons, as we have seen, enact that a proof is legal or competent (*probatio legalis*), only when it is submitted at the trial, after the *litis contestatio*; that otherwise it has no legal force whatever as proof. This is so true that, as we show in our *Elements*, n. 728, the ecclesiastical judge cannot pronounce a person guilty, whom, of his own private knowledge, he certainly knows to be guilty, but who by the

[1] S. C. EE. et RR., Oct 11, 1818. [2] Droste, p. 129.

[3] The Roman Congregations alone have the privilege of omitting the reasons upon which their sentence is based in criminal causes; chiefly because there is no appeal from their decisions.—Droste, p. 130.

[4] Our *Elements*, vol. ii., n. 1182. [5] Droste, l. c., p. 130.

[6] There we observe that no crime is punishable unless it is designated by law as punishable.

[7] Can. 18, Caus. 2, Q. 11, § noluit enim; Rota, l. c., p. 485; Pierantonelli, p. 149; Droste, p. 128.

judicial evidence, is not proved guilty.[1] Card. de Luca assigns, as one of the reasons of this law, the following: "Ea enim dignoscitur differentia inter forum internum et externum, quod in primo, cujus Deus est judex, qui corda et mentes hominum videt, sola veritas, quamvis intrinseca et hominibus occulta, attenditur. In altero autem, cujus judex est homo, qui videt in facie, non autem in corde, requiritur *extrinseca justificatio publica in actis*, adeo ut veritas, non solum sibi, sed *omnibus pateat*." [2] For the other reasons given by St. Ambrose and St. Thomas, see our *Elements*, Vol. II., n. 728, sq.

421. Fourth, it must be absolutely in writing; and should be read by the judge himself, and dictated to the chancellor, in the presence of the prosecutor and the accused or his advocate. Consequently the accused or his advocate must be cited for sentence, on pain of nullity of the proceedings. One simple citation is sufficient. For fuller information on final sentences, see our *Elements*, Vol. II., Nos. 1169–1193. See also the *Third* Volume of the same work.

Art. XXXV.

How the Sentence is Delivered to the Accused.

XXXV. "Sententia reo intimetur, qui potest ad auctoritatem superioris instantiæ appellationem interponere."

422. Although, as we have seen in the preceding article, the accused or his advocate is present when the sentence is pronounced, yet the present article justly prescribes that a written notification—*i.e.*, an authentic copy of the sentence—shall be served on the accused (*sententia reo intimetur*) in order that he may be able to frame his appeal and introduce it to the higher ecclesiastical judge. For, as we shall show further on, the *judex ad quem* cannot receive a suspensive

[1] De Luca, de Jud., disc. 22, n. 2, sq. [2] L. c.

appeal, except when the appellant has shown by public documents, namely, by an authentic copy of the sentence and other public documents, that the appeal is interposed by (*a*) the proper person, (*b*) within the proper time, (*c*) from a final sentence, or one having the force of a final sentence, or from a gravamen, which cannot be undone by a final sentence. See *Const. ad Militantis*, Bened. XIV., 30 March, 1742, § 43, 44.

423. But in what way must this written notification of the sentence be made to the accused? According to some, the answer is given in article xiv. of the present Instruction, which enacts that all intimations and notifications shall be made (*a*) absolutely in writing, (*b*) and be delivered either by the regular official messenger of the curia, or if there be none, by any qualified—*i.e.*, worthy or reliable person, or also by registered mail.

424. According to others—*v.g.*, the *Acta S. Sedis*, Vol. XV., p. 396, the notification in the case must necessarily be made through a *messenger*, and therefore cannot be made by registered mail. The reason given by the *Acta S. Sedis* for its opinion, is that article xxxvi. prescribes, that in appeals, the decree of the S. C. EE. et RR., dated Dec. 18, 1835, shall be observed. Now this decree enacts: "I. Reis. . . . spatium decem dierum conceditur, quo. . . . appellare possint." II. Decem dies numerari incipient non a die, quo sententia lata est, sed a die, quo reo vel ejus defensori *per cursorem* denuntiata fuit." The *Acta* infers also, from the words *reo vel ejus defensori*, that the sentence can be delivered either to the accused *or to his advocate.*

425. Whatever may be said on this head, it is, no doubt, better and safer to deliver the authentic copy of the sentence to the accused, by a messenger rather than by registered mail. For, as we shall see under article xxxvii., the accused must make his appeal within ten days from the *time he received the notification* of the sentence, and not from

the time sentence was *pronounced*. And if he culpably fails to do so, he loses his right of appeal; consequently, it is of the utmost importance that no room be left for doubting as to whether the notification was really served upon the accused, and as to what precise time it was done.

426. The second paragraph of the present article states that the accused can appeal to the higher ecclesiastical authority against the decision of the court. We shall speak of appeals in the following articles.

CHAPTER VI.

APPEALS.

ART. XXXVI.

Nature, Object, and Effects of Appeals.

XXXVI. "In appellatione observentur normae expressae in Const. Sa Me. Benedicti XIV., Ad Militantis, diei 30 Martii 1742 ac caeterae indictae a S. C. Episcoporum et Regularium, decreto diei 18 Decembris, 1835, et epistola circulari diei 1 Aug. 1851."

427. This article ordains that in appeals, the rules shall be observed which are laid down in the *Const. Ad Militantis*, issued by Pope Benedict XIV., March, 1742, and in the decree of the S. C. EE. et RR. of Dec. 18, 1835, and the circular letter of the same Congregation, dated Aug. 11, 1851. Now the *Const. Ad Militantis* enumerates the cases where appeals have a suspensive and where they have only a devolutive effect, and also states the manner in which suspensive appeals are interposed and adjudicated. The decrees of 1835 and 1851, lay down some additional rules respecting the manner in which the appeal is interposed and adjudicated. Hence, it may be said, that the present article comprises, so to say, the whole law of the Church concerning appeals and their effects. It therefore expressly applies to the United States the normal law of the Church in regard to appeals, as we shall explain farther on. This is a radical change in our discipline. For, up to the present time, no appeal whatever, even though it was against a final judicial sentence, has, practically speaking, had a suspensive effect.

428. We have already discussed most of the questions re-

lating to appeals, in our *Elements of Ecclesiastical Law*, Vol. I., Nos. 443, sq.; Vol. II., Nos. 1207, sq. Here we shall merely touch upon the principal questions bearing upon the matter, and discuss under separate headings the nature, admissibility, effects, etc., of appeals.

§ 1. *Nature and Object of Appeals.*

429. What is an appeal? It is the act of a person having recourse against his superior to the higher superior or judge, on account of a grievance, either already inflicted or about to be inflicted.[1] We say, *on account of a grievance either already inflicted or about to be inflicted;* for it is allowed to appeal against a grievance, judicial or extrajudicial, not only when it is already inflicted, but also, when a person has reason to fear that it will be inflicted.[2]

430. How many kinds of appeals are there? Two: judicial and extrajudicial. *The judicial appeal* (*appellatio judicialis*) is that which is interposed against judicial acts or proceedings, and can be made during three different stages of the trial: first, *before* the "litis contestatio"—*v.g.*, when the judge assigns too brief a space of time for appearing in court; next, *after* the "litis contestatio," but before the sentence; such is the appeal against interlocutory sentences; finally, *after the final sentence*, namely when the appeal is made against the sentence or its execution. *The extrajudicial appeal* (*appellatio extrajudicialis*, called also *provocatio ad causam*) is that which is interposed against extrajudicial acts or decrees, by which a person feels aggrieved.[3]

431. What is meant by a simple recourse (*supplicatio, recursus, querimoniæ*) and how does it differ from appeals, judicial and extrajudicial? The recourse, as here understood, is an humble request addressed to the supreme judge—*i.e.*, to the

[1] "Appellatio est ab inferiore ad superiorem judicem provocatio facta ratione illati vel inferendi gravaminis."—Schmalzg., l. 2, t. 28, n. 1.

[2] Schmalzg., l. 2, t. 28, n. 1. [3] Ib., l. c., n. 4.

Pope, praying him to redress a grievance or revoke a sentence, against which it is not allowed to appeal.[1] We say, *against which it is not allowed to appeal.* This is to be understood in three ways. 1. The law of the Church denies the right of appeal, in some cases, *absolutely*—*e.g.*, where a person has both *juridically* confessed his guilt, and also been juridically convicted of it. 2. In other cases, the law admits of the appeal and that either *in suspensivo*, or at least, *in devolutivo*, but yet provides that if the appellant fails to interpose it within ten days, he shall forfeit this right. 3. Finally, in other cases, which exclude the appeal, the law forbids the appeal even *in devolutivo*, as is the case in sentences *ex informata conscientia.* Now, in all these cases, the law of the Church, following the rules of equity rather than of strict justice, authorizes the party who feels himself wronged, to have recourse to the Holy See, in order to have the matter examined and decided.[2] See our *Elements*, Vol. I., n. 443.

432. This recourse differs from appeals, judicial and extrajudicial, in several respects. Thus, *first*, the appeal usually suspends the sentence or its execution; the recourse does not. *Second*, the appeal judicial, and extrajudicial, must be made within ten days; the recourse can be made to the Supreme Pontiff within two years. *Third*, the appeal is an ordinary remedy, and granted to all, as a right, being one of the legitimate means of a defence; the recourse is given as an extraordinary remedy, and *as a favor, not as a right.*[3] *Fourth*, appeals, judicial and extrajudicial, may be made to the Metropolitan; recourse only to the Holy See. Why are appeals established? Chiefly, 1. In order to remove the grievance unjustly inflicted. 2. To correct the injustice, inexperience, want of knowledge, or other defect of the judge in the first instance. 3. To enable the litigant, who either through

[1] Schmalzg., l. c., n. 2; Stremler, p. 371. [2] Reiff., l. 2, t. 28, n. 20.
[3] Schmalzg., l. c.; Stremler, l. c.

ignorance or negligence has failed to establish his case properly in the first instance, to remedy this defect in the second instance. See our *Elements*, Vol. II., n. 1228.

433. From this, it will be seen how salutary and necessary a remedy is the right of appeal. The Holy Ghost himself assures us, that every man can err—*omnis homo mendax* (Ps. cxv.). Consequently every ecclesiastical judge is liable to error, in his actions, judgments or decisions. The right of appeal is founded on this truth. For, if it is possible that the ecclesiastical superior may fall into mistakes, and thus wrongfully condemn a person, the latter must have the right of calling upon the higher superior for protection. Hence the right of appeal is called by the sacred canons *remedium defensionis*. It is a legitimate means of defence, and is, therefore, so far as its substance is concerned, granted by the very law of nature. We say, *so far as its substance*, etc.; for its *formalities*, that is, the manner in which it is interposed, etc., are established by the positive law of the Church.[1]

§ 2. *Who Can, and who Cannot Appeal?*

434. In order that an appeal may be lawful and admissible, it must be interposed by the proper person—*per legitimam personam*. Who then is allowed to appeal? Speaking in general, the rule is that all persons whatever, can appeal judicially or extrajudicially, as the case may be, whenever they consider themselves unjustly aggrieved by the action of the superior.[2] The reason is that, as we have seen, the appeal is a means of defence,[3] and therefore granted by the very law of nature to all persons who feel themselves injured.

435. Speaking in particular, the following persons can ap-

[1] Schmalzg., l. c., n. 6. [2] Reiff., l. 2, t. 28, n. 32.
[3] Cap. Cum speciali, 61, § Porro (ii. 28).

peal: 1. The person upon whom the gravamen is inflicted. 2. All other persons who, though not directly affected by the gravamen or sentence, yet are indirectly affected by it and therefore consider themselves wronged by it.[1] Thus, where an ecclesiastic is condemned —*v.g.*, for incontinence with a certain woman, the latter, though not condemned by the sentence, can nevertheless appeal against it, as well as the ecclesiastic himself, who is condemned. For her good name is injured by the sentence. 3. Hence those who are not affected by the sentence, cannot appeal.

§ 3. *To Whom Should the Appeal be Made?*

436. As a rule, the appeal from a judge or superior must be made to the *next higher* judge, or *immediate* superior. This holds true not only of judicial appeals, but also of appeals against extrajudicial grievances.[2] Consequently appeals from the Bishop or his Vicar-general should be made to the *Metropolitan;* from the Metropolitan to the Primate or Patriarch; from the Primate or Patriarch to the Holy See. See our *Elements*, Vol. I., n. 452.

437. We say, *as a rule.* For, it is always allowed to appeal *directly* to the Holy See, without first appealing to the intermediate superior.[3] Yet it seems to be the mind and desire of the Holy See that except in certain cases, appeals, especially in countries which are far away from Rome, should be made first to the *immediate* superior—*i.e.*, to the Metropolitan and only afterwards to the Holy See. We say: *except in certain cases;* namely, where the *immediate* superior is either morally or physically hindered or incapacitated from hearing and deciding the appeal—*v.g.*, where he is suspected, or excommunicated, or suspended.[4]

438. We have said that the appeal from the Metropolitan

[1] Can. non solent, c. 2, q. 6.

[2] Bouix, de Jud., vol. ii., p. 251.

[3] Can. 4, 5, 6, 7, 8, 15, 16, C. ii., q. 6.

[4] Can. 16, c. 2, q. 6: Santi. l. 2, t. 28, n. 9.

should be made to the Patriarch or Primate. This needs explanation. Formerly Primates and Patriarchs possessed jurisdiction over Metropolitans, and consequently could receive appeals from their sentence or acts.[1] At present, however, they no longer possess this power. Hence it is not allowed, at present, to appeal from the Metropolitan to the Primate or Patriarch. *A fortiori*, it is not allowed to appeal from one Metropolitan to another, since Metropolitans have no jurisdiction over each other, except where they receive it by special delegation from the Holy See.

439. As a matter of fact, both in the United States and elsewhere, the Holy See at present deputes neighboring Metropolitans to hear and decide appeals made from other Metropolitans, acting as a court of the *first instance*. Thus, as far as concerns us, the *Third Plenary Council of Baltimore* (n. 316) decrees: "Quod si a judicio curiæ Metropolitanæ *primæ instantiæ* ad aliam curiam appellandum sit, appellatio ex speciali concessione S. Sedis (ut etiam in Instr. S. C. pro causis matrim., § 26, determinatum est) fiet ad *Metropolitanum viciniorem*." With us, therefore, subjects of a Metropolitan, can appeal from the sentence of the latter, acting in his capacity as judge of the first instance, to the nearest Metropolitan, as the judge of the second instance, and of course, also from the latter to the Holy See.

§ 4. *In what Cases is it Allowed to Appeal? In what Cases is it Forbidden to Appeal?*

440. In what cases can appeals be made? Generally speaking, it is allowed to appeal, except where canon law *expressly* prohibits it, against *any gravamen*, whether judicial or extrajudicial. See our *Elements*, Vol. I., nos. 444, sq. The reason is that the appeal, as we have seen, is a legitimate

[1] Our *Elements*, vol. I., n. 527, 528.

means of a just defence against any act whatsoever, by which a party feels aggrieved.[1]

441. We have just said, *except where canon law expressly prohibits it;* hence, in order that a person may have the right to appeal in a particular case, it is not necessary that the law should expressly grant the appeal for such case. It is sufficient if it does not expressly exclude the case.[2] Consequently the *onus probandi* that the law expressly forbids an appeal in a particular case, lies upon the one opposing the appeal, not upon the appellant. Hence the appeal must always be admitted, whenever it is not shown by the adversary—*v.g.*, by the diocesan prosecutor, that the appeal in the case is expressly forbidden by law.[3] Now the law of the Church expressly forbids appeals in some cases altogether, that is, both "quoad effectum suspensivum" and "quoad effectum devolutivum:" in others, only as to the suspensive effect.

I. Cases which do not Admit of any Appeal Whatever.

442. *Q.* In what cases does the law of the Church expressly prohibit appeals altogether?

A. In the following: I. Where a person approves the sentence pronounced against him, either expressly or tacitly—*v.g.*, by not appealing within the ten days, and thus renounces the right of appeal.[4]

443. II. Where a person is truly contumacious, *vere contumax*—that is, where a person having been, according to the present *Instruction*, cited to appear for trial, first in a simple and then in a peremptory manner, yet refuses to appear for trial, and that without alleging any sufficient excuse; and where such person is therefore tried in his absence, found

[1] Leur., For. Eccl., l. 2, l. 28, q. 1082. [2] Bouix, de Jud., vol. ii., p. 249.
[3] De Luca, de Jud. Disc. xxxvii., n. 2.
[4] Cap. 54. de app. (ii. 28.); Cap. 20., de off. Deleg. (i. 29).

guilty and condemned. From this condemnatory sentence there is no appeal.[1] For a person thus stubbornly disobedient makes himself unworthy of the benefit of appeal. We say *truly contumacious;* for presumptive or fictitious contumacy does not deprive of the right of appeal.[2]

444. III. Where a person has both *confessed* his guilt spontaneously and in court, and has also been at the same time *convicted* of it by full legal proof or *probatio plena.* Hence a person who has merely confessed his crime, but not been also convicted of it by legal proof, has the right to appeal; for he is allowed to revoke his confession, at least, when he alleges and proves that he made it from error, etc.[3]

445. IV. Where *three sentences* of the same tenor or import have been pronounced against a person, in the same cause and in the same particular points of such cause. For it is allowed to appeal *twice*, but not three times in the same cause. Thus a person can appeal from his Ordinary to the Metropolitan; then from the Metropolitan to the Holy See.[4] But he cannot appeal a third time, lest, otherwise, the proceedings should never end. Besides, the presumption militates against a person who succumbs or is condemned, not only in the court of the first instance, but also successively in two courts of appeal.[5] However, though it is not allowed to appeal a third time in the same case, yet it is lawful, after the third adverse sentence, to supplicate the Holy See for a new hearing, that is, to have *recourse* to the Pope to review the case, not as a matter of right, but as a favor. For the other cases, which do not admit of appeals, see our *Elements*, Vol. I., n. 445, 448.

446. Here it should be observed that in all these causes

[1] L. Ex consensu ff. de app; L. contumacia ff. de re judicat.

[2] Reiff., l. 2, t. 28, n. 303. [3] Schmalzg. l. c., n. 11.

[4] L. un. C. Ne liceat in una (vii. 70); Cap. sua nobis 65 de app. (ii. 28); Pellegr., l. c., p. iii, Sect. 1, n. 15. xxxiv.

[5] Reiff., l. c., n. 312.

which do admit of an appeal, even *in devolutivo*, it is allowed to have recourse to the Holy See for redress. This recourse, however, does not, as a rule, suspend the action of the superior *a quo*.

II. Cases which admit only of a devolutive appeal, or even only of a simple recourse.

447. *Q.* In what cases does the law of the Church, as in force at present also in the United States, expressly forbid appeals *in suspensivo*, though not *in devolutivo*?

A. In the cases just enumerated, the appeal is forbidden altogether, that is, both "in suspensivo," and "in devolutivo." There are other cases where the Church allows the appeal indeed, but yet gives it merely a devolutive, not a suspensive effect.[1] These cases, which are laid down in the sacred canons, the Council of Trent and the Apostolic Constitutions, are all summed up in the *Const. ad Militantis*, issued by the great Pontiff Benedict XIV., March 30, 1742. This Constitution, which is now the general law of the Church in regard to appeals, is made obligatory also in the United States, by article xxxvi. of the *Instructio*, now under consideration. Now Pope Benedict XIV., in the above *Const. ad Militantis*, decrees that no suspensive but only a devolutive appeal, or also, as the case may be, only a simple recourse to the Holy See is allowed, against the following decrees or acts.

448.—1. Against any decrees of the Bishop, which regulate divine worship, and the celebration of the Mass. (C. Trid. sess. 21, c. 8, de Ref.; sess. 22, decret. de obs. et evit. in celebr. Missæ).

449.—2. Against ordinances of the Bishop requiring the clergy, secular and regular, to assist at public processions, and regulating the precedence among ecclesiastics secular

[1] Pierant., p. 161.

and regular, who intervene at these processions. (C. Trid. sess. 25, c. 13, de Reg.; Const. *Etsi Mendicantium* S. Pii V., § 7.)

450.—3. Against decrees that determine the manner in which rectors and others having charge of souls, should perform their parochial duties, or administer the sacraments, or preach the word of God, according to the disposition of the Council of Trent, sess. 5, c. 2, de Ref.; sess. 24, c. 4, de Ref.

451.—4. Against the appointment of a pro-rector or *vicarius curatus* in churches which have the care of souls annexed, and which are at the same time united to chapters, colleges, monasteries, etc., according to the Council of Trent, sess. vii., c. 5 and 7, de Ref.; and the *Const. ad Exequendam* of Pius V.

452.—5. Against the decree or injunction of the Bishop, by which he obliges the rector of a parish which is too large to be administered by himself alone, to take one or more assistant priests. (C. Trid. sess. 21, c. 4 and 5, de Ref.)

453.—6. Against the decree of the Bishop, by which he divides a parish, in order to form a new one. (C. Trid. sess. 21, c. 4, de Ref.; sess. 24, c. 13, de Ref.)

454.—7. Against the appointment of a coadjutor or assistant priest, for a rector or parish priest, who, though of a blameless character, is yet ignorant and unskilful to such a degree as to be unable to govern his parish:[1] against the suspension or even dismissal from a parish, inflicted upon a parish priest who is juridically convicted of incorrigible immorality. We say *juridically convicted*, that is, convicted upon a trial, which, however, may be summary. We say again, *of incorrigible*, etc.;[2] for, as the Council of Trent expressly enacts, dismissal can be inflicted in the case only as a last resort, and consequently, after the milder punish-

[1] C. Trid. sess. 21, c. 6 de Ref.

[2] Cf. Bouix, de Paroch., p. 389, 393.

ments, such as suspension—have been vainly tried. (C. Trid. sess. 21, c. 6, de Ref.) When the Bishop thus inflicts suspension or dismissal, no suspensive appeal lies against his sentence. And justly so; for it is manifestly improper and ruinous to souls to allow a rector, who is convicted of incorrigible immorality, to remain in charge of souls, pending the adjudication of the appeal.

455.—8. Against the decree of the Bishop obliging rectors or parishioners to repair a parochial church, which stands in need of repairs, in the manner laid down by the Council of Trent, sess. 21, c. 7, de Ref.

456.—9. Against censures, or the sequestration and subtraction of the ecclesiastical income, and other legal measures, even dismissal from parish, inflicted by the Bishop upon a parish priest or others having the care of souls, after due trial and judicial proceedings, for stubbornly refusing to reside in their parish or church, according to the decree of the Council of Trent, sess. xxiii., c. 1, de Ref.

457.—10. Against the act or decree of the Bishop denying, revoking, suspending, or restricting the faculty to hear the confessions of seculars, in regard to priests who are not rectors or parish priests, according to the prescription of the Council of Trent, sess. 23, c. 15, de Ref.; and the *Const. Superna* of Pope Clement X.

458.—11. Against the Bishop's decree, establishing fixed limits between the various parishes, and making the parish priests irremovable, according to the decree of the Council of Trent, sess. 24, c. 13, de Ref.

459.—12. Against the appointment of a priest to act as administrator of a vacant parish, till the new rector is properly appointed; against the holding of the concursus; against the appointment of a new rector, according to the disposition of the Council of Trent, sess. 24, c. 18, de Ref.

460.—13. Against the Bishop's decree forbidding ecclesiastics, secular or regular, to preach the Word of God, in

opposition to his will (C. Trid. sess. 5. c. 2, de Ref.; sess. 24, c. 4, de Ref.; Const. *Inscrutabili* Gregorii XV.; Const. *Supcrna* Clementis X.)

461.—14. Against the visitation and correction of abuses, in all things relating to the care of souls, and the administration of the sacraments, according to the *Const. Inscrutabili* of Pope Gregory XV.[1]

462.—15. Against decrees and ordinances respecting the enclosure of nuns, and the administration, spiritual and temporal, of convents of nuns, according to the enactment of the Council of Trent, sess. 25, de Reg. et mon., cap. 5, 9 and 10, and the *Const. Inscrutabili* of Gregory XV.[2]

463.—16. Against the pastoral visitation of the diocese, and especially of monasteries where the religious discipline is not being observed; against the execution of those things which have been enjoined and decreed in these visitations; against the decrees made even out of visitation, concerning the life, propriety of conduct, dress, etc., of ecclesiastics, in accordance with many decrees of the Council of Trent, especially sess. 6, c. 4, de Ref.; sess. 13, c. 8, de Ref.; sess. 22, c. 1 and 8, de Ref.; sess. 24, c. 10, de Ref. This, however, must be understood in accordance with the decree of the S. C. EE. et RR., issued by command of Pope Clement VIII. in 1600, which enacts that when the Bishop, in making his visitation, or in correcting the manners of his subjects, proceeds judicially, or inflicts, even though extrajudicially, regular ecclesiastical penalties, or an irreparable gravamen, a suspensive appeal lies against his acts and decisions. Hence the appeal "in suspensivo" is forbidden in the case, only when the Bishop proceeds *paternally,—i.e.*, when he imposes paternal remedies, such as warnings, etc., but not when he inflicts penalties proper, or censures, or grave disciplinary corrections.

[1] Const. *ad Militantis*, § 19. [2] Ib., § 20.

464.—17. Against sentences inflicted by the Bishop "ex informata conscientia" according to the Council of Trent, sess. 14., c. 1 et 3, de Ref. Observe that against these sentences the only remedy is a recourse to the Holy See, as no appeal whatever, even "in devolutivo" to the Metropolitan lies against them. See our *Elements*, Vol. I., n. 445: Vol. II., n. 1283.

465.—18. Against the fixing of the term or time, within which a regular, who has notoriously transgressed outside of the monastery, shall be punished by his own superior.[1] Against the punishment and correction itself of these religious, as defined in the *Const. Inscrutabili* of Pope Gregory XV.

466.—19. Against censures or other punishments inflicted upon laics, men and women, and especially upon ecclesiastics, who have been found guilty, on due trial, of concubinage, according to the Council of Trent, sess. 24., c. 8, de Ref. Matr.; sess. 25, c. 14, de Ref. The meaning of this law is not that the Ordinary can impose censures or other punishments upon concubinary ecclesiastics, without a previous trial. For the Council of Trent, in the place here quoted, expressly teaches that a summary trial must precede the punishment. The meaning is that from the punishment, inflicted after due trial, there is only a devolutive appeal.

467.—20. Against the examination, approval or rejection of the title of Patrimony, Ecclesiastical Pension or Benefice, required for promotion to sacred orders, according to the disposition of the Council of Trent, sess. 21, c. 2, de Ref.

468.—21. Against the execution on the part of the Bishop, in the cases permitted by the law of the Church, of all pious dispositions, whether made by last will and testament, or between the living, according to the Tridentine enactment, sess. 22, c. 8, de Ref.

469.—22. Against the Bishop's making the visitation of

[1] C. Trid. sess. 25., c. 14, de Reg.; Const. *Suscepti Muneris* of *Clem.* VIII.

charitable institutions, or of any pious place by whatsoever name designated, of colleges, schools, confraternities, etc., according to the disposition of the Council of Trent, sess. 22, c. 8, de Ref.

470.—23. Against decrees of the Bishop obliging persons who administer the ecclesiastical property of churches, or of charitable and religious institutions, to render annually an account of their administration, except in cases where, in the foundation and rules of any church or fabric, the contrary is expressly set forth, according to the Council of Trent, sess. 7, c. 15, de Ref.; sess. 22, c. 9, de Ref.; sess. 25, c. 8, de Ref.

471.—24. Against decrees compelling notaries, even though apostolic, who write out the acts of ecclesiastical causes or trials, to undergo an examination; against their removal or suspension from their office of notary in case they are found incompetent or guilty of delinquency in the discharge of their office, in accordance with the Council of Trent, sess. 22, c. 10, de Ref.

472—25. Against the erection of the seminary; the taxation for its support; the regulations concerning its government, according to the enactments of the Council of Trent, sess. 23, c. 18, de Ref.

473.—26. Against the mandate or decree ordering the vicar-capitular or administrator of a vacant diocese, to render an account of his administration of the vacant diocese, in harmony with the Tridentine prescription, sess. 24, c. 16, de Ref.

474.—27. Against the *threat* of the ecclesiastical judge that he will proceed to pronounce declaratory sentence, that is, that he will declare that a person has incurred "ipso facto" excommunication, suspension or interdict, which is *a jure*, that is, imposed by the law itself and "latæ sententiæ." Against the censures of suspension, excommunication or interdict, which are inflicted *ab homine*, once they have been already imposed by the ecclesiastical

judge.[1] To understand this better, it is necessary to bear in mind that censures are divided into two kinds; first, those which are *a jure*; secondly, those which are *ab homine*. When the Ordinary threatens to declare officially that a person has incurred a censure which is *a jure* and *latæ sententiæ*, no suspensive appeal lies against such a threat; since, as Stremler says, it is allowed to appeal "in suspensivo" against the declaratory sentence itself, after it has been pronounced. But the case is different with censures *ab homine*. They do not admit of a suspensive appeal after they are once inflicted. Hence it is just that they should allow of a suspensive appeal, before they are inflicted. See our *Elements*, Vol. I., n. 445; Vol. II., n. 1279, sq.; and Vol. III., where we speak "ex professo" of appeals against censures.

475.—In all the above cases, and matters which are, with one or two exceptions, extrajudicial acts of the superior, it is allowed indeed to appeal "in devolutivo" to the Metropolitan or judge *ad quem*, or as the case may be, to have extrajudicial recourse to the Holy See, but it is not permitted to lodge a suspensive appeal unless the Ordinary exceeds his powers. Thus Pope Benedict XIV. expressly declares: "Volumus quod ab archiepiscopis aliisque judicibus ecclesiasticis . . . citationes cum inhibitione, *per quam executio decretorum mandatorum et provisionum hujusmodi retardetur, suspendatur aut impediatur, minime concedantur* . . . Decernentes quod adversus decreta, mandata et provisiones ejusmodi, quas, vel quae, ab episcopis, aliisque locorum Ordinariis fieri, vel capi contigerit in causis et negotiis praedictis, *vel simplex dumtaxat, et extrajudicialis recursus per viam supplicis libelli ad Nos et successores nostros Romanos Pontifices, vel respective, et juxta causarum naturam et qualitatem, appellatio ad quos de jure*, in solo devolutivo, et sine retardatione vel praejudicio legitimæ executionis, recipi et admitti possit."[2]

[1] Const. *ad Militantis*, § 45; Decr. S. C. EE. et. RR., 1600, § ix.

[2] Const. *ad Militantis*, Bened. XIV. § 38.

476. Now the effect of the devolutive appeal in these cases is that it confers upon the superior *ad quem*, or the Metropolitan to whom the appeal is made, the right and duty to take cognizance of and inquire into the whole matter or alleged grievance, and to give his decision on the merits of the case, either confirming or reversing in whole or in part the action or decision of the superior *a quo*. We say *duty*, etc.; for the superior *ad quem* cannot remit the case to the superior *a quo*, but is obliged himself to take cognizance of and decide it.[1]

477. We have said, however, *unless the Ordinary exceeds his powers;* for if he does overstep the limits of the powers granted him by the laws of the Church, in the above cases, a suspensive appeal lies against him, even in the above cases.[2] To understand this better, we observe that the *Const. ad Militantis*, in so far as it enumerates the cases not admitting of a suspensive appeal, may be divided into three parts: The first gives the decrees of Bishops respecting the pastoral administration of the diocese, namely, divine worship, the administration of the sacraments, the preaching of the Word of God; the second, the decrees or ordinances of the Bishop made during or in connection with the visitation of the diocese, whether they relate to the official duties of ecclesiastics or their personal conduct; the third, the regulations or decrees, which have for their object the correction of morals of ecclesiastics, and are made out of visitation.[3]

478. Now against these decrees themselves there is only a devolutive, but no suspensive appeal. Consequently, even though a person appeals against such ordinances, he must carry them out, pending his appeal. But suppose an ecclesiastic, against whom the Bishop makes such a decree, refuses to obey the decree or violates it? Can the

[1] Cap. 59, de app.; Reiff., l. 2, t. 28, n. 234. [2] Cap. Irrefragabili, 13, de off. ord. [3] Cf. Prael. S. Sulp., tom. 3, p. 128.

Bishop enforce his decree by punishments? He certainly can inflict *paternal* corrections in the case, such as admonitions, spiritual retreats, small pecuniary fines, and that without any trial, though not without a previous *summaria facti cognitio*. Against these paternal remedies, it is allowed to appeal "in devolutivo," but not "in suspensivo." The Bishop can, of course, also inflict regular punishments and censures, if the nature of the case so demands. But he must give the delinquent a trial, before inflicting such punishments;[1] and it is allowed to appeal, not merely "in devolutivo" but also "in suspensivo" against these punishments in all the cases enumerated in the *Const. ad Militantis*, save in the one or two cases indicated in this Constitution.[2] See our *Elements*, Vol. I., n. 447 and 555.

479. It should also be borne in mind that the *Const. ad Militantis* makes no new regulations or enactments whatever, and does not, in any way, change the decrees of the Council of Trent, the previous declarations of the S. C. EE. et RR., or the teaching of canonists, either in regard to the effect of appeals, or the manner in which they are interposed and adjudicated. Thus Pope Benedict XIV. expressly says:[3] "Constat hac nostra constitutione *non novas ferri* sed antiquas instaurari leges." In fact, so far as concerns the effect of appeals, the cases which do not admit of a suspensive appeal are already sufficiently set forth by Pope Innocent IV., in the Cap. Romana 3, de app. in 6° (ii. 15), the Council of Trent, and in the decrees of the S. C. EE. et RR. of Oct. 16, 1600, confirmed by Pope Clement VIII.,[4] and of Sept. 5, 1626, approved by Urban VIII., and in the decree of the S. C. C., May 15, 1700.[5] All that the *Const. ad Militantis* does is to group together, in one complete list, all the cases which do not allow of a suspensive appeal, and

[1] Droste., p. 107. [2] Cf. Præl. S. Sulp., tom. 3 n. 707, p. 129.
[3] Const. *ad Militantis*, § 48. [4] See Giraldi, Part. i., Sect. 308, p. 204.
[5] Monacelli, Form. leg. p. 2, t. 15, form. 2, n. 8, p. 210.

which are found scattered through the above sacred canons and apostolic constitutions.[1]

480. Finally, as Pope Benedict XIV. remarks in his *Const. ad Militantis*, § 39, there may be particular cases, which though they apparently fall under the rule excluding suspensive appeals, are yet, owing to particular circumstances, exempt from it, and admit of a suspensive appeal, and that in accordance with the mind of the Council of Trent, the Pontifical Constitutions and with the common teaching of canonists. These cases or exceptions to the rule, continues the Pontiff, can, as a rule, be determined only by the prudent judgment of the judge. However, even in these exceptional cases, the judge *ad quem* cannot admit the appeal "in suspensivo" and issue the inhibitions, except it appears to him, after a summary inquiry, that the particular circumstances of the case, as set forth clearly and in writing by the appellant, and verified by a document which constitutes at least a half-proof, that the case is excepted from the general rule. Only then can the judge "ad quem" issue the inhibitions to the Bishop or judge "a quo;" he is obliged, on pain of nullity, to insert in his letters of inhibition this clause: "Nos enim, attentis juribus, et supplici libello nobis præsentatis, atque in actis exhibitis, sicut præfertur, inhibendum esse speciali rescripto mandavimus."[2]

III. Cases which Admit of a Suspensive Appeal.

481. *Q.* In what cases does the law of the Church, as in force at present, and as applied also to the United States by the present *Instruction*, give a person the right to appeal "in suspensivo"? In other words, in what cases has the appeal a suspensive effect also with us?

A. Having seen in what cases appeals are absolutely for-

[1] Rota, l. c., p. 530.
[2] Const. *ad Militantis*, § 39; Rota, p. 530; Giraldi, Expos. J. P., p. 212, n. xxxv.

bidden, and in what cases they are indeed allowed, though only *in devolutivo*, it follows that in all other cases, not mentioned above, it is allowed to appeal both "in devolutivo" and "in suspensivo." For it is certain that unless the contrary is expressly stated, the appeal has always a suspensive effect, no matter whether the appeal is from a judicial or an extrajudicial grievance. To understand this teaching better, it is necessary to recall the division of appeals into judicial and extrajudicial. Judicial appeals are subdivided into those which are interposed against a final judicial sentence, and those which are against an intermediate or interlocutory judicial decision.

482. I. It is certain that it is allowed to appeal against all final judicial sentences, except in the few cases expressly stated in law, and enumerated by us above, n. 442, sq. and that such appeal produces a suspensive effect.[1] For the law of the Church expressly enacts that an appeal from a final sentence *suspends* the jurisdiction of the judge *a quo*, so that he has no power to execute his sentence.[2] This law is also clearly applied to the United States by the recent *Instruction* of 1884, in article xxxvii.

483. However, the *Third Plenary Council of Baltimore*, n. 286, decrees: "Cum in pluribus provinciis nostris rectores ecclesiarum ipsa lege constituantur ex officio ecclesiarum suarum æditui, caute nobis providendum est ne, quando necesse fuerit rectorem aliquem munere suo privare, ipse per interjectam appellationem sententiæ executionem impediat, et sic officium æditui coram potestate civili conservet. Statuimus ergo, annuente Apostolica Sede, nullum rectorem etiam inamovibilem juridice remotum, depositum, vel munere suo privatum, contra sententiam Ordinarii *in suspensivo*, ut aiunt, appellare posse, sed *in devolutivo* tantum, ita ut desinat esse ædituus ecclesiæ cujus rector erat, vel perpetuo,

[1] Cap. 7 et 10, de app. in 6° (ii. 15); Reiff., l. 2, t. 28, n. 210. [2] Ib.

vel usque ad tempus quo judex *ad quem*, definitive litem terminans, eum in munus suum redintegret. Quapropter usque ad litis terminationem non definitive alius rector, sed administrator cum juribus competentibus instituetur, et Episcopus interim utriusque, tum amoti rectoris tum administratoris honestæ sustentationi providebit."

484. We say "*final* judicial sentences;" since the rule is that in judicial causes or proceedings it is not allowed to appeal either "in suspensivo" or "in devolutivo," until after the final sentence has been pronounced. Thus the Council of Trent expressly ordains: "There shall be no appeal, *before the definitive sentence*, from the Bishop or his Vicar-general in spirituals, against any interlocutory sentence, etc."[1] For, according to the new law, as defined by the Council of Trent, all causes must, in the first instance, be tried before and *decided* by the Ordinary.[2] Hence, before the Ordinary has rendered his final decision in a case, the latter cannot be carried before the higher judge on appeal, except where the Ordinary fails to render his final decision within two years from the time the suit was instituted.

485. II. We have just said, *the rule is;* for there are three exceptions. Thus it is allowed to appeal, *in suspensivo*, before the final sentence is pronounced, and during the course of the trial or judicial proceedings, against intermediate or interlocutory decisions, resolutions or acts of the ecclesiastical judge in these three cases: (*a*) when the intermediate decision or act is, in reality, *equivalent, in its effects, to a final sentence;* (*b*) when it inflicts a *damnum irreparabile*, that is, a grievance which cannot be remedied by a final sentence or by an appeal from a final sentence; (*c*) when it is *not allowed* to appeal from the final sentence itself.[3] In these three cases, it is allowed to appeal, not only "in devolutivo," but

[1] Sess. xiii. C. 1 de Ref.; sess. 24. c. 20, de Ref.

[2] C. Trid. sess. 24, c. 20 de Ref.

[3] Trid. sess. xiii., c. i. de Ref.; sess. xxiv., c. 20 de Ref.; Stremler, p. 404.

also "in suspensivo" against an intermediate decision and before the final sentence is pronounced.[1] But from all other interlocutory decisions, which are given prior to the final sentence, there is no appeal whatever, not even "in devolutivo." This is but just and necessary. For, if it were allowed to appeal, even though only "in devolutivo," against intermediate decisions or acts, which do not materially affect the main cause on trial, nor inflict an irremediable gravamen, there would be no end to trials or judicial proceedings. However, a person has the right to enter a protest against such intermediate decisions. This protest must be noted in the minutes, but has not the legal effect of an appeal.

486. This teaching concerning appeals from intermediate decisions, as enacted by the Council of Trent, has been confirmed by subsequent legislation, especially by the decree of the S. C. EE. et RR., *ad tollendas*, § iii., v., viii., ix., and by Pope Benedict XIII.,[2] and especially by Pope Benedict XIV., in his *Const. ad Militantis*, 1742, § 43, 45, and consequently is the law to be followed at present all over the world, and also in the United States.

487. Stremler observes that the disposition of the Council of Trent restricting appeals against interlocutory decisions, does not apply to ecclesiastical causes of a civil, but only to those of a criminal character.[3] Here the question arises: When is an intermediate decision or sentence regarded as having the force of a final sentence, or inflicting an irremediable grievance? For the answer, see our *Elements of Ecclesiastical Law*, Vol. II., Nos. 1159, sq.

488. III. *When does the appeal against extrajudicial acts or decisions produce a suspensive effect?* It is certain that an appeal *in suspensivo* lies against extrajudicial acts or decisions, which inflict a grievance that cannot be remedied or

[1] Decretum *ad tollendas*, S. C. EE. et RR. 1600, § viii.

[2] Ad Decr. ix. Clem. VIII., *ad tollendas*. [3] Stremler, p. 405.

undone.[1] With regard to appeals from other extrajudicial acts or sentences, the rule is, that they also have not only a devolutive, but, moreover, a suspensive effect, unless the contrary is expressly stated. For the law of the Church expressly gives a person the right to appeal against extrajudicial grievances. Thus Pope Alexander III. enacts:[2] "Quoniam sacri canones etiam extra judicium passim appellare permittunt."[3] Now, by the right of appeal, the sacred canons mean the right to appeal *in suspensivo*, unless the contrary is expressly stated. (See our *Elements*, Vol. II., Nos. 1244, sq.)

Professor Santi, however, observes that the appeal against extrajudicial grievances, which are not irremediable, produces a suspensive effect, not at once, but only after the superior *ad quem*, having seen the cause or reason of the appeal, given by the appellant, admits the appeal and begins to examine into the merits of the case.[4]

489. We have said that the extrajudicial appeal has a suspensive effect, unless the contrary is expressly stated in law. Now, the law of the Church, as enforced at present, and embodied in the Const. *ad Militantis* of Benedict XIV., and therefore also in force with us, enacts that the appeal against the extrajudicial acts or decrees, which are enumerated in said Constitution and given by us above, shall have no suspensive effect. For fuller information on this point, see our *Elements*, Vol. II., n. 1249, 1250. We sum up as follows: According to the law of the Church, as embodied in the Const. *ad Militantis*, of Benedict XIV., and therefore also in force with us, the appeal has a suspensive effect, whenever it is interposed against a final sentence, or an interlocutory sentence which has the force of a final sen-

[1] Bened. XIV., Const. *ad Milit.*, § 45.

[2] Cap. 51 de app. (ii. 28); Pierantonelli, p. 160; Præl. S. Sulpitii, vol. iii., p. 141.

[3] Cap. 5, de app. (ii. 28). [4] Santi, l. 2, t. 28, n. 3; arg. cap. 46 de app. (ii. 28).

tence, or inflicts an irreparable injury, or against any act or decision, even though extrajudicial, of the superior which imposes an irremediable gravamen.

Art. XXXVII.

When the Appeal must be Interposed.

XXXVII. "Intra terminum decem dierum a notificatione sententiae interpositio appellationis fieri debet, quo elapso tempore sententiae executio locum habet."

490. Having seen, in the preceding article, what is meant by appeals; in what cases they can be made; what is their effect; it now remains to discuss the manner in which they are made. This mode of appealing is set forth in the decree of the S. C. EE. et RR., 1835, and its circular letter of 1851. In accordance with the general law of the Church,[1] the present article states that the appeal must be interposed before the judge *a quo*, within ten days from the time the appellant has received official notification of the sentence. This holds true, not only with regard to appeals from final judicial sentences, of which we hear speak, but also of appeals against interlocutory decisions, which either have the force of a final sentence or inflict an irremediable grievance, and of appeals from extrajudicial grievances.[2]

491. We say, *from the time the appellant has received official notification*, etc.; consequently, the ten days are not computed from the day the sentence was pronounced, even though the accused was present when it was pronounced, but from the day the official notice of it was served. Thus the decree of the S. C. EE. et RR. of 1835, which the *Instruction* (art. xxxvi.) lays down as the rule to be followed, says: "Decem dies numerari incipient non a die, quo sententia lata est, sed a die, quo reo vel ejus defensori per cur-

[1] Cap. 15 de Sent. et rejud. (ii. 27); Cap. 8 de app. in 6° (ii. 15).

[2] Schamlzg., l. 2, t. 28, n. 71; Pellegr, Part. iii., Sect. i., n. 70.

sorem denuntiata fuit." (§ ii.). Observe that these ten days are to be counted as beginning at the very hour the notice was received and as ending at the same hour ten days afterwards, so that if a person were notified of the sentence, for instance, on Dec. 10, at 9 A. M., the ten days would expire on Dec. 20, at 9 A. M.[1] Moreover, these ten days run continuously and without any interruption, and consequently include even Sundays and holidays; and justly so; for it is allowed to appeal also on Sundays and holidays of obligation.[2]

492. We say, *even though the accused was present when the sentence was pronounced.* Here it will be seen that the Instruction has changed the law and custom of former years. For nearly all canonists formerly held that the ten days began to run from *the very moment the sentence was pronounced*, when the accused was present and heard it pronounced.[3] The *Instruction*, however, enacts that in all cases, even where the accused is present and hears the sentence, the ten days shall be computed, not from the day the sentence was passed, but from the time an authentic copy or official notice of the sentence was properly delivered to the accused. This is just. For, before a person appeals, he ought to know, not simply the general tenor of the sentence, but also its specific nature, and the reasons upon which it is based.[4]

493. If no appeal is interposed within ten days, the appellant is regarded as having abandoned his appeal and the sentence becomes *res judicata*, and may be forthwith executed. If, however, the appellant can show that he was hindered by a just cause—*v. g.*, sickness, poverty, etc., from making the appeal within the ten days, he should not be cut off from the

[1] Schmalzg., l. c., n. 72. [2] Ib.

[3] Arg. Cap. 15, de Sent. et re jud.; Cap. 8 de app. in 6°; Bouix, de Jud., vol. ii., p. 282.

[4] S. C. C. *in Aritana*, Particip. 17 Sep. 1859; Pallotini, Coll. v. appellatio, § iii., n. 12–15.

right of appealing, even after the lapse of the above term.[1] For fuller information, see our *Elements*, Vol. I., nos. 444, sq.; Vol. II., Nos. 1207, sq.

494. The appeal must be interposed within ten days *before the judge* "*a quo*," that is, before the judge from whose sentence the appeal is made, so that he may not proceed any farther in the case, nor execute his sentence. Is it necessary that the appeal should be interposed before the judge "a quo" *in writing?* Here we must distinguish between two kinds of appeals: First, those which are made against final judicial sentences and also against interlocutory sentences having the force of a final sentence. Second, those which are against interlocutory sentences, that inflict a gravamen which cannot be undone by a final sentence, and also those which are against extrajudicial grievances. Now, appeals of the first kind, namely, against final or quasi-final sentences, can be made *viva voce*, when they are interposed the same day the sentence is pronounced; when they are made afterwards, they must be *in writing*. This writing or letter to the judge *a quo* need not assign the grievance or cause of the appeal, nor state anything else but the simple fact that an appeal is taken against the final or quasi-final sentence. For the formula of appeal from final sentences, see Bouix, de Jud., Vol. II., p. 596.

495. But when the appeal belongs to the second class, that is, when it is against an interlocutory sentence, inflicting a *damnum irreparabile*, or against extrajudicial grievances, the appellant must always interpose his appeal *in writing*, and state (though not *prove*) at the same time the grievance or reasons on account of which the appeal is made, in order that the judge *a quo* may himself, if he chooses, redress the grievance. For, as we show in our

[1] De Luca, de Jud., disc. 37, n. 29; Pierant., p. 35; Pellegr., Part iii., Sect. i., n. 72.

"Elements," Vol. II., Nos. 1209, the judge "a quo" may himself correct interlocutory decisions, inflicting an irreparable injury, and redress extrajudicial grievances, even after an appeal has been interposed. And after he has done so, he can proceed in the case, notwithstanding the appeal. The case is different with final or quasi-final decisions. These the judge "a quo" cannot himself reverse or change, since he is *functus officio*, once he has pronounced them.

Art. XXXVIII.

Duties of the Judge "a quo" with Regard to Appeals.

XXXVIII. "Appellatione interposita, continuo Curia ad auctoritatem Ecclesiasticam superioris instantiae omnia acta causae in suis autographis, id est, processum, ejus summarium, defensionem ac sententiam mittit."

496. When the Ordinary, that is, the *Curia* or judge "a quo," has thus been notified of an appeal against his sentence, whether final or interlocutory, in the sense explained, he must suspend the execution of such sentence, and, as the present article expressly enacts, he must *forthwith* transmit to the superior or judge to whom the appeal is made, all the acts and documents of the cause or trial of the first instance, namely, the acts of the trial itself, both informative and probative, its synopsis, the defence, and the sentence. He must send the originals themselves and not merely a copy.

497. Here, then, it will be seen that the procedure marked out by the *Instruction*, in the present article, differs somewhat from that laid down by the sacred canons. First, no mention whatever is made of the *apostoli*. According to the general law of the Church, as contained in the sacred canons,[1] the appellant was always obliged to ask the judge *a quo* for the *apostoli*, and that within thirty days, on pain of

[1] Can. post appellationem 31, c. 2, q. 6; Cap. 6 de app. in 6°; Clem. 2, de app.

forfeiting his right of appeal,[1] as we show in our *Elements*, Vol. II., n. 1211.

498. The judge "a quo" was bound to give the appellant the *apostoli* or certificate of appeal, and also a copy of all the acts of the cause, which the appellant himself forwarded to the judge *ad quem*, or the judge to whom he had appealed. Thus the Council of Trent, sess. 24, c. 20 de Ref., ordains: "Furthermore, should any individual appeal in those cases allowed by law, or lodge a complaint touching any grievance, or have recourse, as aforesaid, to a judge. . . . *he shall be bound to transfer, at his own expense, all the acts of the proceedings that have taken place before the Bishop.* . . . Moreover, the notary shall be bound to furnish the appellant, upon payment of a suitable fee, with a copy of the proceedings, *as soon as may be, and within a month at the furthest.*"

499. Instead of all this, the *Instruction* simply enacts that the judge "a quo" (or curia "a qua,") shall himself forward, and that *at once*, to the judge *ad quem*, the entire original acts of the case, thus doing away with the necessity of asking for or giving the *apostoli*. Consequently these *apostoli* seem to be entirely abolished by the present *Instruction*.[2] In fact, as we say elsewhere, these *apostoli* had long ago fallen into disuse, if not universally, at least in many ecclesiastical courts. Our *Elements*, Vol. I., p. 425.

500. Secondly, in former times, the judge "a quo" was obliged to send merely a *copy* of the acts: now he is bound to forward the *originals* themselves. Observe, the *Instruction* says that "*omnes* actus causæ," must be sent to the judge *ad quem*. Hence, as Cardinal de Luca teaches,[3] the *entire* acts and proceedings of the first instance, and consequently, not only those which are material and relevant, but also those which are immaterial or irrelevant, provided, of course, they

[1] Schmalzg., l. 2, t. 28, n. 75. [2] Rota, l. c., p. 536.
[3] De Jud. Disc. 35-37, n. 37, 38.

belong to the case, must be forwarded, *in their entirety*, to the *judex ad quem*. In accordance with this rule, the *Instruction* not only says "*omnia* acta," but moreover specifies the various acts themselves, which must be forwarded to the judge *ad quem*, namely, (*a*) the *processum*, that is, all the acts of the trial,[1] namely, the citations, delays asked and granted, challenges against the judge, exceptions made by the accused, the indictment or charges preferred by the diocesan prosecutor, the plea or contestation of the accused, the proofs submitted on both sides, such as the testimony of the witnesses,[2] and all the other steps or proceedings of the trial;[3] (*b*) the synopsis of the trial made out by the auditor; (*c*) the defence; (*d*) the sentence.

501. *Q.* Can the metropolitan or judge, to whom an appeal has been interposed, proceed to hear and decide the case appealed, even though the acts of the first instance have not been forwarded to him?

A. The rule is, that he cannot, and that if he, nevertheless, does proceed without these acts, his whole procedure is null and void.[4] The reason is, that he should principally judge from the acts of the first instance, whether the sentence or decree or decision of the judge *a quo* is to be confirmed, or amended, or reversed. We say,[5] *the rule is;* for where the judge *a quo* is guilty of culpable delay in sending the acts, or in any other way raises obstacles against the entire acts being delivered to the judge *ad quem*, or even refuses to send them, the metropolitan or judge *ad quem* can condemn him to pay double the cost of the trial,[6] and proceed to adjudicate the case appealed to him, without the acts, and solely on the *ex parte* papers or proofs submitted by the appellant.[7]

[1] Arg. Cap. quoniam 11 de prob.
[2] Leur. For. Eccl., l. 2, t. 28, q. 1081.
[3] Our *Elements*, vol. ii., n. 925.
[4] Card. de Luca, de Jud. Disc. 37, n. 34.
[5] Leur., l. c., q. 1081.
[6] Conc. Trid., sess. 24, c. 20 de Ref.
[7] *Const. ad Militantis*, § 44; Card. de Luca, l. c., n. 41.

502. Observe also that the Ordinary or superior *a quo* is bound to forward the acts of the case to the metropolitan or judge "ad quem," not only when the appeal is judicial and suspensive, but also when it is *extrajudicial* and *merely devolutive*. This is plainly stated by the Council of Trent, sess. 24, c. 20, de Ref.

Art. XXXIX.

Rights and Duties of the Judge "ad quem," in Regard (a) to Receiving the appeal; (b) Issuing Inhibitions; (c) Revoking Attentates.

§ 1. *Admission of the Appeal.*

XXXIX. "Haec porro superioris instantiae auctoritas appellatione cognita appellanti injungit, ut intra triginta dies defensorem deputet, qui ab ipsa approbandus est."

503. This and the two succeeding articles point out the rights and duties of the judge to whom the appeal is made. When the judge "ad quem" has received the above acts and documents from the judge "a quo," or also the letters of appeal, together with an authentic copy of the sentence, from the appellant, and has ascertained, by an inspection of these documents, that the appeal is in form,[1] that is, has been interposed (*a*) by the proper person, (*b*) within ten days, (*c*) against a final sentence, (*d*) or one having the force of a final sentence, (*e*) or from a gravamen which cannot be remedied by a final sentence, he shall forthwith admit the appeal, and that "in suspensivo," and then notify the appellant that within thirty days he must appoint his counsel, who is to be approved by this same judge "ad quem."

504. From this it will be seen that the rights and duties of the judge "ad quem," as outlined in the *Instruction*, vary in several respects from the rights and duties of the same

[1] Card. Kutschker, Eher. vol. v., p. 947.

judge, as defined in the sacred canons. Thus according to the common law of the Church, the judge "ad quem," has no power to fix the time within which the appellant must introduce the appeal before him or his court.[1] On the contrary, the law vests this power in the judge "a quo," or in case the latter does not fix the time, leaves the appellant free to introduce his appeal before the judge "ad quem," at any time within a year, or according to some, six months from the date the appeal was first made, as we show in our *Elements*, Vol. II., n. 1213.

505. The *Instructio* rescinds all this, and vests the judge "ad quem" with the right and duty to fix the time—namely, thirty days,—within which the appellant must appoint his advocate, and thus introduce his appeal before him. Hence the appellant is no longer free, as he was formerly under the common law, to choose his own time, within a year, nor does the judge "a quo" seem to have, any longer, the right to fix the term for introducing the appeal before the judge "ad quem."

506. We have said, *when the judge "ad quem" . . .* has ascertained *by an inspection of these documents,* etc.; for it is plain that he cannot admit a suspensive appeal except in those cases where, as we have shown above, it is allowed to make such appeals. Now, how is the judge "ad quem" to find out whether the appeal brought before him is in reality made against a final sentence, or a quasi-final sentence, or an irreparable gravamen? Evidently from the public documents submitted to him, namely, from the acts of the case sent him by the judge "a quo," or from the authentic copy of the sentence forwarded to him by the appellant. All this is expressly enacted by Pope Benedict XIV., in his *Const. ad Militantis,* which is, word for word, to be regarded as our law, in these words: "Appellationes (*i.e.*, in suspen-

[1] Schmalzg., l. 2, t. 28, n. 87.

sivo) autem non recipiantur, neque inhibitiones vigore illarum concedantur, *nisi prius constiterit*, quod nedum per legitimam personam, et intra legitima tempore vere appellatum fuerit; sed etiam, quod appellatum fuerit a sententia definitiva, vel habente vim definitivæ, aut a gravamine quod per definitivam sententiam reparari non possit: idque per *publica documenta*, quæ realiter in Actis exhibentur. Tunc enim, et non antea, judici, ad quem appellatum fuerit, in causa se intromittere, liceat."[1] The same is enacted also by the decree *ad tollendas* of the S. C. EE. et RR., 1600, § III., which decree is re-enacted in the *Const. ad Militantis*, § 45.

507. Observe it is here expressly decreed that the judge "ad quem" shall, before admitting the appeal, ascertain, by the inspection of *public documents*, that the appeal is from a final sentence, etc. These public documents consist, as we have seen, in the acts of the case transmitted by the judge "a quo," or also in the authentic copy of the sentence forwarded by the appellant. But suppose the judge "a quo" fails to send the acts of the case, and the appellant asserts that he has been refused an authentic copy of the sentence, what is to be done? It is sufficient for the appellant to present to the judge "ad quem" a simple unauthentic copy of the sentence or decree. Whereupon the judge "ad quem" can admit the appeal "in suspensivo," and if need be, issue inhibitions to the judge "a quo." This is expressly enjoined in the *Const. ad Militantis*, § 44: "Quod si appellans asserat, sententiæ aut Decreti exemplum authenticum culpa judicis a quo, vel Notarii, sive actuarii, habere non posse, tunc saltem copiam simplicem sententiæ seu Decreti, in actis producere teneatur, ejusque tenori, in literis inhibitorialibus inserto adjicienda erit, prout adjici volumus et mandamus, in earum corpore expressa conditio: 'Quatenus tamen tenor insertus vere, et in substantialibus cum Originali concordet,

[1] § 43.

codemque Originali præsentes literæ sint in tempore posteriores, alioquin nullæ, et irritæ censeantur.'"

508. In order to understand the rights and duties of the judge "ad quem" more fully, it is necessary to bear in mind that appeals are either judicial or extrajudicial; that judicial appeals are subdivided into those which are made against (*a*) a final sentence, (*b*) or an interlocutory sentence having the force of a final sentence, (*c*) or inflicting an irreparable gravamen.

509. When a *judicial* appeal is made to the judge "ad quem" against a *final sentence* or an *interlocutory* decision, which is equivalent to and therefore has *the force of a final sentence*, the duty of the judge "ad quem" is simply to inspect the public documents submitted to him, namely, the acts of the case forwarded by the judge "a quo" or the copy of the sentence transmitted by the appellant, and to see whether the decision complained of in the appeal is really a final or quasi-final sentence. As soon as he finds that the sentence is final or quasi-final, he can and should at once admit the appeal, and notify the appellant to appoint his advocate within thirty days. He can also forthwith, if need be, issue the inhibitions to the judge "a quo" and revoke all attentates. Hence, in making this kind of appeal the appellant need not express, either to the judge *a quo* or judge *ad quem*, the grievance or cause on account of which he appeals. All that he need say is that he appeals from such or such a sentence. Nor is the judge "ad quem" obliged to examine whether there is reasonable cause or ground for appealing. See *our Elements*, Vol. II., n. 1215.

510. But when an appeal is made against an interlocutory decision which it is claimed by the appellant inflicts an *irreparable grievance*, the case is somewhat different. Here the judge "ad quem" must ascertain from the public documents submitted, namely, the acts of the case, or the authentic copy of the decree, or in default of these, a simple unauthentic copy

of the sentence—first, that the grievance alleged to have been inflicted by the intermediate decision is "de jure" an irreparable one—*i.e.*, one which the law, either expressly or tacitly, regards as irreparable; second, that the grievance has been in reality inflicted. Hence, also the person who appeals against such interlocutory sentences must, in his letter of appeal to the judge "ad quem," state (*a*) the cause of his appeal—*i.e.*, he must name the grievance; (*b*) he must show that the law, either expressly or tacitly, regards it as an irreparable one; (*c*) he must also prove that it was really inflicted.

511. When the judge "ad quem" finds and decides that the interlocutory grievance in the case subsists in law and in fact—*i.e.*, has been really inflicted and is one of those contemplated in law as irreparable, the whole case, that is, not only the interlocutory grievance, but also the entire *main* cause itself, devolves upon him, in such a manner that the jurisdiction of the judge "a quo" becomes suspended, and he cannot proceed any farther in the case.[1]

512. Finally, when the appeal is interposed against an *extrajudicial* act or grievance, it is necessary to distinguish between those grievances which inflict an irreparable gravamen—*v.g.*, the threat of inflicting a censure—and which consequently admit of a suspensive appeal, and those which do not inflict an irreparable grievance and therefore admit only of a devolutive appeal, namely, the cases enumerated in the Const. *ad Militantis* of Benedict XIV. Now the judge "ad quem" cannot admit a suspensive appeal interposed against an alleged irreparable extrajudicial grievance, until after he has inspected the *acts or documents* of the case, and ascertained from them that the grievance has really been inflicted and is irreparable. For this purpose he can and should ask, and if need be, order the judge or superior "a quo" to send

[1] Cap. 59 de app.; Reiff., l. 2, t. 28, n. 235.

him the *acta* of the case, and meanwhile forbid him to proceed any farther in the case. This is expressly ordained by Pope Benedict XIV. in his Const. *ad Militantis*,[1] which is at present obligatory, also with us. The words of the Constitution (§ 45) of the immortal Pontiff, are: "Cum vero a *gravamine*, quod per definitivam *reparari nequit*, appellatum fuerit . . . ubi agatur de censuris jam prolatis, vel de comminatione carcerationis,[2] Torturæ,[3] aut censurarum, obsevetur omnino dispositio Decretorium Congregationis Episcoporum sub rec. mem. Clemente VIII., juxta additiones, et declarationes piæ mem. Benedicti XIII."

513. The decrees of the S. Congregation of Bishops and Regulars here referred to, are:

"VIII. In causis vero Visitationis Ordinariorum aut correctionis morum appellationes quoad effectum devolutivum tantum admittantur, *nisi de gravamine per definitivam irreparabili agatur*; vel, cum Visitator, citata Parte, et adhibita causæ cognitione, Judicialiter procedit: tunc enim appellationi locus erit, etiam quoad effectum suspensivum."

"IX. Cum a gravamine, quod per definitivam reparari nequit, ut indebitæ carcerationis vel torturæ, aut excommunicationis, etiam comminatæ, appellatur: nonnisi visis actis, ex quibus evidenter appareat de gravamine, appellatio admittatur, aut inhibitio vel provisio aliqua concedatur."

The additions and declarations of Pope Benedict XIII., mentioned in § 45 of the Constitution *ad Militantis* are given in the additions *ad IX. Decretum*, and quoted by us below.

514. We have said, *has been really inflicted and is irreparable*; for, the question as to whether the grievance has been *justly*

[1] § 45; Decr. S. C. EE. et RR., 1600, § ix.; Add. Bened. XIII. ad ix. Decr.

[2] *Ecclesiastical imprisonment* is not, strictly speaking, in vogue with us. We say, *strictly speaking*; *for confinement in a monastery*, which is equivalent to *carceratio*, may be and is in use with us.

[3] Torture proper is now out of use, in ecclesiastical proceedings, almost everywhere.

inflicted or not, that is, the question whether the offence or cause for which it was inflicted was really committed, and if so, whether it was sufficiently grave to warrant the gravamen, is reserved for the consideration of the judge "ad quem" after he has admitted the appeal, and which is decided by him only after the appeal has been tried and when final sentence is to be pronounced upon the merits of the case appealed.

515. Before admitting an extrajudicial appeal which has merely a *devolutive effect*, the judge "ad quem" should indeed be certain that the case appealed to him is one that admits of such appeal, but it is not prescribed that he must derive this certainty from the *Acta* of the cause, or other *public* documents, as in the case of suspensive appeals. All this will be better understood by a glance at the formulas of appeals against interlocutory sentences and irreparable grievances, as given in Pellegrino, p. 262, and Bouix, de Jud., Vol. II., p. 594, 599, 600.

§ 2. *Inhibitions.*

516. As soon as the metropolitan or judge "ad quem" has ascertained, by a simple summary and extrajudicial inspection of the above public documents, or of a simple, unauthentic copy of the sentence, or decree where, owing to the fault of the judge "a quo," the public documents cannot be had, that the sentence or decree, against which the appeal is interposed, is really final or an interlocutory decree which has the force of a final sentence, or inflicts an irremediable grievance, or is an extrajudicial irreparable gravamen, he can forthwith issue inhibitions (*inhibitiones, litteræ inhibitoriales*) to the judge "a quo," forbidding him to proceed any farther in the case, or to execute his sentence or decree.[1] Nay, he has not only the *right*, but also the

[1] Cap. Romana 3, de app. in 6°, § 3 et 4; Cf. Schmalzg., l. 2, t. 28, n. 100.

duty and *obligation* of sending this prohibition, whenever the appellant, in the above cases, fearing lest the judge "a quo," notwithstanding the suspensive appeal interposed, will proceed further in the case, and therefore petitions the judge "ad quem" to issue the inhibitions.[1] From this it will be seen that the same conditions which authorize the judge "ad quem" to receive the appeal "in suspensivo," empower him also to grant the inhibitions. This is plainly laid down in the Constitution *ad Militantis* of Benedict XIV. § 43, 44, as follows: "Appellationes (in suspensivo) autem non recipiantur, *neque inhibitiones vigore illarum concedantur*, nisi prius constiterit, quod nedum per legitimam personam, et intra legitima tempora vere appellatum fuerit: sed etiam, quod appellatum fuerit a sententia definitiva," etc.

517. When there is question of an appeal from an extra-judicial gravamen, which is irremediable—*v.g.*, the threat of the Ordinary to inflict a censure upon a subject—the judge "ad quem" can admit the appeal and issue the inhibitions only *visis actis—i.e.*, only after he has inspected the public and authentic acts or proceedings of the superior "a quo." Thus the Decree of S. C. EE. et RR. 1600, which Pope Benedict XIV.[2] re-enacts, says:[3] "Cum a gravamine quod per definitivam reparari nequit, ut excommunicationis etiam comminatæ, appellatur nonnisi visis actis ex quibus evidenter appareat de gravamine, appellatio admittatur, *aut inhibitio* vel provisio aliqua concedatur."

518. For this purpose, the judge "ad quem" has the right to compel the judge "a quo" to forward him the *Acta*. Thus Pope Benedict XIII. ordained in the Roman Council, held in 1725: "In causis vero comminatæ . . . excommunicationis, sanctitas sua declarat et mandat, ut non expediantur inhibitiones generales indefinitæ, *sed tantum compulsoriales pro transmissione copiæ actorum*, ad effectum cognoscendi an

[1] Bouix, de Jud., vol. ii., p. 287. [2] Const. *ad Militantis*, § 45. [3] § IX.

sit deferendum nec ne appellationi, adjuncta in dictis litteris compulsorialibus, inhibitione, ut interim judex a quo ad ulteriora non procedat."[1] This law is re-enacted by Pope Benedict XIV., in his Constitution *ad Militantis*, § 45.

519. *Q.* In what manner should the metropolitan or judge "ad quem" issue the inhibitions, also in the United States?

A. He is bound, on pain of nullity of his proceedings, to insert in his inhibitory letters the tenor of the authentic copy of the final sentence, or of the interlocutory decree having the force of a final sentence or inflicting an irremediable gravamen. Where the appellant asserts that an authentic copy was refused by the judge "a quo," it will be sufficient for the judge "ad quem" to insert in the inhibitory letters the tenor of the simple—*i.e*, *unauthentic copy* of the sentence or decree, though he must add, at the same time, the following clause: "Quatenus tamen tenor insertus vere, et in substantialibus cum Originali concordet, eodemque Originali præsentes litteræ sint in tempore posteriores; alioquin nullæ et irritæ censeantur."[2]

520. The object of these precautions is to prevent the judge "ad quem" from being misled by the appellant into issuing inhibitions in cases where the appeal is not suspensive. For it is plain that where the appeal is only devolutive—*v.g.*, in the judicial and extrajudicial cases enumerated in the *Const. ad Militantis*—and where, consequently, the judge "a quo" can execute his decree or sentence, pending the appeal, the judge "ad quem" cannot issue inhibitions forbidding him to proceed any further in the case. However, even in appeals which are merely devolutive and not suspensive, if the judge *a quo* threatens something which interferes directly with the appellant's appeal—*v.g.*, if he threatens to punish him for daring to appeal, or if he thwarts the appeal and interposes obstacles in the way of

[1] Add. ad decr. ix. Clem. VIII.

[2] Const. *ad Militantis*, § 44.

the appellant's prosecuting the appeal, the judge *ad quem* can, nay, if requested by the appellant, should issue inhibitions, forbidding the judge *a quo* to do anything which stands in the way of the appeal. For where the law gives a person the right to appeal "in devolutivo," it also gives him "eo ipso" the right to take the necessary steps to prosecute that appeal, and imposes upon the judge *ad quem* the duty to protect him in the exercise of these rights.

§ 3. *Attentates.*

521. The inhibitions, of which we have just spoken, are issued in order to *prevent* the judge *a quo* from taking any steps prejudicial to the appellant, and therefore presuppose that he has not yet taken these steps. We now come to the remedy, by which such prejudicial acts or steps, *when actually inflicted*, after the appeal has been interposed, are *reversed*. Every appeal which is interposed against a final sentence, or an interlocutory sentence having the force of a final sentence or inflicting an irreparable grievance, or against an irremediable extrajudicial grievance, suspends, as we have seen, the jurisdiction of the superior *a quo*, in regard to the case or grievance against which the appeal is lodged; and consequently, such appeal strips him of all power to proceed any further in the case, or execute his sentence, pending the adjudication of the appeal. Hence the law of the Church, as still in force, also with us, decrees that if the judge *a quo*, notwithstanding such appeal, proceeds in the case or does anything whatever which is injurious to the appellant, his acts are to be looked upon as attentates (*attentata*)—*i.e.*, as vain and futile attempts, and are *ipso jure* null and void,[1] and must be revoked before all else.[2]

522. *Q.* By what judge or superior are attentates to be revoked also in the United States?

[1] Cap. 1. ut lite pend. etc. in 6° (ii. 7).

[2] Cap. 7, de app. in 6°.

A. By the superior or judge "*ad quem*"—*i.e.*, to whom the appeal has been made. For such attentates imply a contempt of his authority. In reality, when a suspensive appeal is made, the case devolves *eo ipso* to the judge *ad quem* in such a manner that he alone can proceed farther in the case. The hands of the judge *a quo* are tied. Consequently, if the latter nevertheless, proceeds in the case, he clearly despises the authority of the judge *ad quem*.[1]

523. *Q.* What is required in order that the attentates, perpetrated after a suspensive appeal, can and should be revoked also in the United States?

A. A distinction is to be made between final sentences and interlocutory. When the appeal is against a final sentence, or an interlocutory sentence having the force of a final sentence, the judge "ad quem" can and should reverse the attentates, *before all else*, as soon as the appellant has shown (*a*) that a final or quasi-final sentence was passed, (*b*) that he appealed from it, (*c*) that attentates took place. When the appeal is made against an interlocutory sentence which inflicts an irreparable gravamen, or against an extra-judicial irremediable grievance, the judge *ad quem* can and should reverse the attentates, after he has ascertained that the sentence or act is really one that inflicts an irremediable grievance, as shown above.[2]

524. What has been said thus far concerning attentates, applies, strictly speaking, only to appeals, judicial or extra-judicial, which have a suspensive effect. We say, *strictly speaking;* for, as we have seen, in speaking of inhibitions, even where the appeal has but a devolutive effect, the judge *a quo* cannot, once the appeal has been made, do anything which will interfere with the appellant's right to continue and prosecute his appeal. Hence, if he does interfere

[1] Pellegr., P. iii., Sect. V., n. 12.; Cf. Leur., l. c., q. 1136.

[2] Cap. 7, de app. in 6°. Schmalzg., l. c., n. 119.

with this right of appeal, the judge "ad quem" can and should revoke such acts.

525. Nay, as we have shown above, under article xxxvi., when speaking of the Const. *ad Militantis*, there may be cases which, according to the strict letter of the law, admit only of a devolutive appeal, and which, nevertheless, owing to peculiar circumstances, and according to the mind of the sacred canons and of the Council of Trent, allow of a suspensive appeal. When such an appeal is made it becomes the duty of the metropolitan or judge to whom it has been interposed, to consider the special features of the case, and to admit the appeal *in suspensivo* if he finds the circumstances warrant it.[1] As soon as he has thus admitted this appeal, he can send inhibitory letters to the judge or superior *a quo*, prohibiting him, not only from putting any obstacles in the way of the appeal, but also from doing anything further in the case itself. And if the superior "a quo" proceeds in the case, notwithstanding the inhibitions, all his acts can and should be revoked as attentates by the judge *ad quem*. However, in issuing inhibitions in these peculiar cases, the judge *ad quem* must be careful to observe what is prescribed by Pope Benedict XIV., in his *Const. ad Militantis*, § 39. For the formula of the decree by which attentates are revoked, see Pellegrino, P. iii., Sect. v., n. 55. For fuller information respecting attentates, see our *Elements*, Vol. I., pp. 425, 427; Vol. II., pp. 303, sq.

[1] Cf. Card. de Luca, de Jud. disc. 37, n. 9.

Art. XL.

Extinction of the Appeal.

XL. "Eo tempore peremptorio frustra elapso, censetur reus beneficio appellationis renuntiasse, quam propterea judex gradus superioris peremptam declarat."

526. Should the appellant fail to select his advocate within thirty days, he will be considered as having renounced his right of appeal, unless he proves that he was hindered by good reasons, from making the selection. Consequently the judge "ad quem" will declare the appeal extinct. From this it will be seen, that the present article, enacts, that the term of thirty days shall be peremptory or fatal to the appeal. This term corresponds to what canonists call the "tempus appellationis introducendae, sive apostolos Judici ad quem præsentandi," which is also a "tempus fatale" according to the general law of the Church.[1]

527. Here it may be asked, whether the appeal,—owing to the failure on the part of the appellant to appoint and present his advocate to the judge "ad quem" within thirty days,—becomes extinct *ipso jure*, or whether a declaratory sentence is required? There is no doubt that a declaratory sentence is necessary. For the *Instructio*, in the present article, expressly ordains that the judge "ad quem" *shall declare* the appeal extinct. Consequently the right of appeal is not forfeited by the appellant who fails to present his advocate in due time, until the judge "ad quem" formally pronounces it extinct. The formula of this declaration is given by Pellegrino, Praxis Vicariorum, P. II., Sect. iii., Subs. i., n. 109.

528. Thus it will be seen that the *Instructio* has settled a question which was formerly controverted. For, as may be seen in Card. De Luca,[2] Pellegrino and other authors,

[1] Cap. 4, de app.; Cf Schmalzg., l. 2, t. 28, n. 70, 75.

[2] Lib. 15, P. i. De Jud., Disc. 37, n. 27, (Venetiis 1734.)

canonists were formerly divided on the question, some holding that the appeal in the case becomes extinct *ipso jure;* others requiring a declaratory sentence.

529. Again, prior to the Instructions of 1880, and 1884, the judge "a quo" had the right to declare the appeal abandoned and therefore extinct, when the appellant failed to introduce the appeal before the judge "ad quem" within the proper time.[1] At present, according to the *Instructio*, the judge "ad quem" alone can make this declaration.

530. Observe also that the *approval* of the advocate by the judge "ad quem," is not included in the term of thirty days. For this approbation does not depend upon the will of the appellant, but on that of the judge "ad quem." It would therefore be unjust to impute any delay in regard to such approval, to the appellant who has no control over it.[2] Thus the law of the church says: "Imputari non debet ei per quem non stat, si non faciat, quod per eum fuerat faciendum." (Reg. 41, de Reg. jur. in 6°).

531. We have said, in the beginning of this article, that the appellant who fails to appoint the advocate, will be regarded as having abandoned his appeal, *unless he can show good excuses* for having failed to select the advocate. For canonists all teach that when the appellant is not guilty of *culpable negligence* in the case, the lapse of the peremptory term should not be fatal to his appeal.[3] Now what may be looked upon as just reasons excusing the appellant in the case? Chiefly, grave illness, poverty, ignorance, wars, pestilence, etc.[4]

[1] Nicollis, Praxis Can. Tom. i. Lit. A. § i. n. 46.—Salisburgi, 1729.
[2] Rota, p. 536 [3] Card. De Luca, l. c., n. 29. sq. [4] Ib., n. 29. 30. sq.

Art. XLI.

Mode of Adjudicating Appeals.

XLI. "In appellatione a sententia Curiae Episcopalis ad Metropolitanam Archiepiscopus in causa cognoscenda ac definienda, eadem procedendi methodo utetur, quae in hac instructione indicatur."

§ 1. *Procedure before the Metropolitan.*

532. When the appellant does not abandon his appeal, but presents the name of his advocate to the Metropolitan, within thirty days, as stated above, the Metropolitan, will then, as a matter of right and duty, proceed to hear or try the case appealed, and upon its conclusion, pronounce final sentence, revoking, amending, or confirming the sentence of the lower court. The mode of procedure or form of trial, which the Metropolitan is bound to observe in hearing and deciding the case on appeal is substantially the same as that observed in the trial of the first instance, as is expressly stated in the present article of the *Instructio*.[1]

533. We shall now briefly describe this mode of procedure. As in the *curia* of the first instance,—where the *curia* is established in accordance with the present *Instructio*,—the ordinary not only can, but is advised to appoint an auditor to conduct the whole trial, so also in the court of the second instance,—where the Archbishop's *curia* is properly established,—it is lawful, nay, advisable for the Metropolitan to commit the hearing or trial of the appeal to an auditor—*i.e.*, to a worthy ecclesiastic, learned in the law of the Church.[2] The functions of this auditor are substantially the same as those of the auditor of the judex *a quo*, whose duties have been already fully explained by us. Where the Metropolitan court is not yet properly constituted, and where consequently commissions of investigation obtain *ad interim*, by Papal dispensation, the hearing or trial of the case appealed

[1] Pierantonelli, l. c., p. 159.

[2] Droste, l. c., 142.

takes place before the commission presided over by the Metropolitan or his Vicar-general.[1]

534. The first step of the court, thus constituted, namely of the auditor, or as the case may be, of the commission, is to issue a citation to the appellee—*i.e.*, to the diocesan prosecutor of the judge "ad quem," and to the appellant or his advocate, notifying them that it will proceed to the hearing or trial of the case appealed on the day and at the place named in the citation, and summoning them to be present. On the appointed day, all the acts or documents of the first instance, as sent by the judge *a quo* to the judge *ad quem*, are opened by the judge *ad quem* in the presence of both the appellant or his advocate, and the *procurator fiscalis* of the judge *ad quem*, who represents and defends the appellee or the *curia* against which the appeal has been lodged.[2] Moreover all other statements or allegations bearing upon the appeal, whether made by the appellant or the appellee, are communicated to the adverse party, so as to enable it to disprove or answer them.[3]

535. At this stage of the proceedings, the appellant and appellee can interpose both dilatory and peremptory exceptions. When these exceptions have been discussed and decided, the judge *ad quem*—*i.e.*, the Metropolitan *or* his auditor, or, as the case may be, the commission of investigation, proceeds to the next stage of the trial of the appeal, which consists in this, that he fixes a term or day, on which both parties must successively present their proofs, such as witnesses, documents, etc., before him. The witnesses are examined by the auditor or commission in the same manner, as on the first trial, that is, under oath,[4] one by one, etc. For the manner, in which the appellant submits and proves his grievances, and the appellee answers them, see our *Elements* Vol. II., n. 1220 sq.; n. 1232 sq.

[1] Instr. art. XII.
[2] Pellegr., l. c., Part., 3. Sect. 4. n. 1.
[3] Ib., n. 4.
[4] Cap. *Fraternitatis* 17 de test. (ii. 20).

536. This term or delay is called *terminus ad non posita ponendum, et non probata probandum*, because it is granted for the purpose of enabling the appellant (*a*) to submit and prove by witnesses etc., in the second instance, whatever allegations or proofs he failed, either through ignorance or negligence, or other cause to produce at the first trial (*ad non posita ponendum*), and (*b*) to produce *additional* or *new proofs* in support of matters or grievances, which were alleged indeed on the first trial, but not proven, or only insufficiently proven (*ad non probata probandum*). For, as we show in our *Elements of Ecclesiastical Law*, Vol. II., Nos. 1223 sq., an appellant has the full right to bring in any new matter, (and of course, also prove it by new testimony, such as witnesses, whether already examined at the first trial or not,) which was not produced by him at the first trial, provided it arises from, or has any bearing upon the cause as tried in the first instance. He can also produce additional proofs, in support of what he alleged indeed at the first trial, but failed to prove sufficiently.[1] The appellee has of course the same right in his reply. (See our *Elements* Vol. II., n. 1220 sq.; Ib. n. 1230 sq.)

537. From what has been said, it follows that the term *ad non posita* etc., is a *substantial* term, and must therefore be granted to the appellant on pain of nullity of the proceedings, also with us, unless he renounces it. The appellant may, if he choses, give up the right to avail himself of this term to produce additional evidence—*v. g.*, because he has nothing to add to what he has already submitted at the first trial, and is contained in the acts.[2] If he does so, the judge *ad quem* can forthwith proceed to pass sentence, after having examined the acts of the first instance, unless he himself finds it necessary to obtain more light on the case. In

[1] Cap. *Fraternitatis* cit.; L. 4. . 17. de temp. app. vii. 63..

[2] Cap. Pellegr. l. c, n. 5.

which latter case he can order the necessary investigations to take place.[1]

538. We remark also that what has been already fully proved in the first instance, by the appellant or appellee, need not, nay, should not be proved over again on the trial of the appeal.[2] For the Metropolitan is not supposed to try the whole case over again, as though it had never been tried before, but rather to give the appellant a chance to allege what he failed to allege, and to prove what he failed to prove on the first trial, so that the defects, irregularities, injustices and omissions of the first trial may thus be remedied. Both questions of law and fact pertaining to the case as decided in the first instance, can be examined and discussed anew in the second instance.[3]

539. Where, as is usual, the parties submit additional evidence, on the appeal, the judge *ad quem*,—*i.e.*, the auditor or commission must order the additional or new testimony together with the minutes of the proceedings to be published or communicated to the adverse party,[4] so that the appellant may know what the appellee has submitted, and vice versa.[5] Either party can then submit rebutting evidence, as we show more fully in our *Elements*, Vol. II., Nos. 1221 sq.; n. 1233 sq.

540. When both the appellant and the appellee declare that they have no further evidence to submit, the auditor proceeds to make a synopsis of the proceedings. Where commissions of investigation still obtain, these bodies make up their report, at the end of the hearing of the appeal, as provided by the Instruction of July 20, 1878, § 9.

541. Thereupon the judge *ad quem*, acting in accordance with the present *Instruction*, assigns both to the appellant

[1] Bouix, de Jud. vol. 2. p. 605.

[2] Cap. fraternitatis cit; L. 4, C. cit.; Pellegr. l. c. n. 7.

[3] Droste p. 142. [4] Bouix, de Jud. vol. ii., p. 605. [5] Pellegr., l. c. n. 7, 8.

and appellee—*i.e.*, the *procurator fiscalis of the judex ad quem*—a term for the summing up,[1] which, according to the *Instruction*, must take place *in writing*, not orally, and in the manner described above, under articles xxxii. and xxxiii. This term, as we have seen is called *terminus ad allegandum et dicendum in jure et in facto*, and must be given in trials of appeals no less than in those of the first instance.[2] It is to be observed here that a correct and faithful record must be kept of all the above proceedings by a secretary or notary of the court.

542. After both parties have handed in their summing up, the Metropolitan or judge *ad quem* fixes a day for the sentence, and issues a citation to the appellant and appellee notifying them to be present in his court to hear the sentence. On the day appointed, he pronounces his sentence in the presence of the appellant or his advocate and appellee, or prosecutor, and the secretary, in the manner laid down in article xxxiv. From this sentence it is allowed to appeal to the higher superior, namely, with us, to the Holy See,—*i.e.*, to the S. C. de Prop. Fide. The appeal must be interposed within ten days, as in the first instance.[3]

543. It is worthy of note that while the judge *a quo* must always in his final sentence, condemn or absolve the accused, and declare him guilty or not guilty, the judge *ad quem* in his sentence should not pronounce directly upon the guilt or innocence of the accused, but declare the justice or injustice, validity or nullity of the sentence of the judge *a quo*. He should therefore pronounce *fuisse bene appellatum et male judicatum*, or inversely, *fuisse male appellatum et bene judicatum*. For the formula of the sentence of the second instance, see Pellegrino, l. c. n. 18.

[1] Inst. art. xxxiii. [2] Pellegr., l. c., n. 8. [3] Pellegr., l. c., n. 8.

§ 2. *Procedure before the S.C. de Prop. Fide.*

544. If the metropolitan, as judge of appeal, confirms the condemnatory sentence pronounced in the first instance, the accused can appeal also from this second sentence, and that, with us to the S. C. de Prop. Fide. For as we have seen, it is allowed to appeal *twice*, in the same cause, but not *three* times. This second appeal has the same effect as the first, namely, either suspensive or only devolutive, according to the rules laid down above.

545. In other words, where the first appeal produces merely a devolutive effect, the second has also merely a devolutive effect. But where the first has a suspensive effect, the second appeal, as made to the Holy See, has also a suspensive effect. For as Cardinal de Luca says, a sentence obtains the force of *res judicata* and can therefore be executed, only after *three* sentences of the same tenor have been pronounced.[1] The words of the great jurist are: "Rei judicatæ æquipollent ejusque vim habent tres conformes sententiae, lege ulteriorem prohibente appellationem, nisi nulitatis, vel injustitiae vitium accedat,"[2]

546. Here it is worthy of note, that while the accused in criminal or disciplinary causes, can appeal from the decision of the metropolitan or judge *ad quem*, the *promotor fiscalis* of the *curia a qua* or first instance cannot appeal from such decision, where it reverses the condemnatory sentence of the judge *a quo*. The reason is, that a defendant, in a criminal cause, if once absolved, is forever absolved from the offence, and therefore cannot be put on a criminal trial again, for the offence from which he was absolved.

547. This is expressly enacted in the law of the Church, which says: "De his criminibus, de quibus absolutus est

[1] Honorius iii., cap. sua nobis 65, de app. (ii. 28), an. 1214; Nicollis, Praxis can. vol. i. p. 62, Salisb. 1729.

[2] Card. de Luca, lib. xv. de Jud. Summa, n. 120.

accusatus, non potest accusatio replicari."[1] According to the Acta S. Sedis, this is also confirmed and applied to our own procedure under the latest *Instruction*, *Cum Magnopere*, in the celebrated decision of the S. C. C. of April 18, 1885, *Mediolan.* In this case, the Rev. David A. had been condemned as guilty, by the curia of Milan, of breaking his fast before saying mass. Against this sentence, he appealed to the S. C. Concilii. This Sacred Congregation reversed the sentence of the inferior curia, and thus absolved David from this crime imputed to him. The procurator or prosecutor of the curia of Milan asked the S. C. C. for a new hearing, (*beneficium novae audientiae*). The Roman advocate of David, however, objected to the new hearing being granted, chiefly on the ground that the decision of the sacred Congregation, having been absolutory, had passed at once into *res judicata*, and therefore admitted of no appeal, or new hearing being granted to the prosecution, since an accused, who is once absolved, is for ever absolved and therefore cannot be tried a second time for the same offence. The Sacred Congregation, by its resolution of April 18, 1885, adhered to its first decision, and thus according to the *Acta S. Sedis*, confirmed the above principle.[2] Hence also, as the Roman advocate of David well remarks, the Instruction of the S. C. EE. et RR., dated June 11, 1880, in article xxxv. gives the right to appeal, in criminal causes, *only to the accused.*

548. The case is different in contentious causes, not of a criminal character. In contentious causes not criminal or disciplinary, not only the defendant, but also the *promotor fiscalis* of the judge *a quo* may appeal from the sentence of the Metropolitan acting as judge *ad quem.*[3]

[1] Cap. 6, de acc. (v. i.)

[2] Acta S. Sedis, vol. xviii., pp. 73, 74; cf. Barbosa, Coll. in lib. 5, t. 1, cap. 6.

[3] The mode of procedure of the S. C. EE. et RR. in contentious causes, *not criminal*, which are appealed to it, is laid down in the Regulations enacted by this S. C. EE. et R. in Sept. 1834, and approved by Pope Gregory XVI. See Bangen l. c., p 533; Stremler., p. 596.

549. Here we speak only of appeals in criminal and disciplinary causes of Ecclesiastics, of which the *Instruction* speaks principally, and not of appeals in other contentious matters. How then are appeals from the United States, in criminal and disciplinary causes, made to the S. C. de Prop. Fide? The answer is indicated in the *Instruction* itself, article xxxvi, which says: "In appellatione observentur normæ . . . indictæ a S. C. episcoporum et RR. decreto diei 18 Decembris 1835 et epistola circulari diei 1 Augusti 1851." The first of these documents lays down expressly and specifically the mode of procedure to be followed in appeals to the Holy See. The second—namely the circular of 1851, confirms the decree of 1835, inculcates anew its strict and exact observance and regulates the appointment of an advocate belonging to the Roman curia to conduct the appeal before the Sacred Congregation at Rome.

550. What then are the rules laid down in these two documents, and applied to this country by the present *Instruction?* The accused must interpose his appeal to the S. C. de Prop. Fide within ten days from the time he receives notice of the sentence pronounced by the judge of the second instance or the Metropolitan.[1] The appeal must be interposed before the court of the second instance. Thereupon, the archiepiscopal curia will *forthwith* ("*continuo*") transmit to the S. C. de Prop. Fide all the acts of the whole case, as decided both in the first and second instances, namely the whole trial, its synopsis, the defence and the sentence of the first and second instance. The curia is obliged to send the originals, not copies.[2]

551. Upon receipt of these acts, the Sacred Congregation will inform the Metropolitan of its acceptance of the appeal, and ask him to notify the appellant that he must within a fixed time, appoint an approved advocate of the Roman

[1] Decretum S. C. EE. et RR. 1835, § I., II., III. [2] Decretum cit. § iv.

curia, to take charge of his case and to present and prosecute his appeal before the Sacred Congregation.[1] Here we see that while the metropolitan acting as judge *ad quem* directly notifies the appellant to appoint his advocate, the Holy See on the other hand acting as the court of the third and last instance, conveys this notification to the appellant, not directly, but through the lower court.[2] It will also be seen, that the appointment of the advocate by the appellant is the first step by which the appeal is introduced to the judge *ad quem*, not only in the second, but also in the instance—*i.e.*, before the Sacred Congregation. If the appellant fails to designate his Roman advocate within the time fixed without alleging sufficient excuses and nobody appears before the Sacred Congregation to prosecute the appeal, it will be assumed that the appellant has renounced his right of appeal. The Sacred Congregation will issue a formal declaration to that effect.[3]

552. Before making this declaration, however, the Sacred Congregation usually prefixes a suitable term, sometimes of six months, and sometimes even of fifteen months, thus giving the appellant ample time to excuse the non-appointment of the advocate, within the proper time, and also to prosecute his appeal.[4]

§ 3. *How the Sacred Congregation hears and decides appeals.*

553. What has been said thus far, relates to the interposition and introduction of the appeal. We come now to the manner in which the Sacred Congregation de Prop. Fide, hears and decides the appeal. Speaking in general, the S. C. de Prop. Fide, like the other Sacred Congregations proceeds *judicially* though only by a *processus summarius*, in deciding *contentious* matters, whether civil or criminal. Hence the point at issue between the contending parties is fixed be-

[1] Litteræ Circ. S. C. EE. et RR. Aug. 1851, [2] Decretum 1835. § V.
[3] Litt. Circ. 1851. [4] Decretum 1835. § VI.; Droste p. 146.

forehand, in the form of a *dubium* or of *dubia*. Under the form of this *dubium*, which is afterwards proposed to the Sacred Congregation, the whole case is decided. This *dubium* is framed or agreed upon by both the contending parties or their procurators or advocates; or in case they fail to do so, by the secretary of the Sacred Congregation, or his assessor. Hence it will be seen, that the agreeing upon this *dubium* takes the place of the *litis contestatio*. The allegations or defences of the parties are always admitted, nay, if one, or both of the contending parties is remiss in the matter, or contumacious, the arguments or defence of said party is made *ex officio* by an official of the Congregation, so that the latter always decides with full knowledge of the case.[1] The Sacred Congregations always pronounce sentence, by saying *affirmative* or *negative*, etc., without giving the reasons for their decisions, since they represent the person of the Supreme Pontiff.[2]

554. All the Roman Congregations, excepting only the Congr. S. Officii, conduct their judicial proceedings *in forma publica*, at least, as a rule. We say, *as a rule;* for sometimes, owing to the persons involved or the nature of the cause, these proceedings are conducted secretly, that is, in such a manner, that the Cardinals who are the judges, and others who take part in the proceedings, are bound to secrecy, by command of the Pontiff.[3]

555. Finally, we observe, that all *contentious* matters which are appealed to any of the Sacred Congregations, belong to the full Congregation, and cannot be decided by its Cardinal-prefect independently of the full Congregation. Only extrajudicial or non-contentious matters of minor import, and which do not affect the rights of a third party, can be expedited by the Cardinal-prefect, and need not be referred to the full Congregation.[4] We say, of *minor import;* for

[1] Santi, l. i., t. 31, n. 62. [2] Santi, l. c., n. 63. [3] Ib. [4] Santi, l. c., n. 59-62.

even extrajudicial matters must be referred to the full Congregation, when they are of a *grave* and *serious* nature. Here we remark in passing, that in deciding extrajudicial matters, the Sacred Congregations proceed extrajudicially and in the following manner: after the recourse or petition has been made to the Sacred Congregation by the petitioner, the Congregation writes to the Bishop or superior of the petitioner for information—*pro informatione et voto.* After receiving the necessary information, it decides the matter.[1]

556. Thus far we have seen in general, how the Sacred Congr. de Prop. Fide, decides contentious causes appealed to it. We shall now consider, in particular, how it hears and decides appeals made to it, under the present *Instruction.* First, the Cardinal-prefect, or the secretary of the Congregation, in the name of the Cardinal-prefect designates one of the officials or consultors of the Congregation to act as Reporter (*judex relator*) on the case.[2] He is called *judex relator* or Reporter, because it is his duty to receive whatever new or additional evidence, papers or documents may be submitted by the appellant, and to report on the whole case, both in writing and orally to the general meeting of the Cardinals held for the purpose of deciding the case. From this it will be seen that the functions of this *judex relator* are similar to those of the *auditor* or *actorum instructor* of the *curia* of the first and second instances, as explained by us above, under articles xii., and xxix.[3]

[1] Ib., n. 57, 58.

[2] In contentious matters which are *not criminal,* one of the Cardinals themselves is designated to report on the case. The Cardinal thus designated is called *Cardinalis ponens;* he assists of course at the full meeting of the Cardinals, and casts a decisive vote like the other Cardinals. In *criminal causes,* the *relator* is not a Cardinal but a consultor or a Prelate, appointed either *ad hoc,* or for all cases in general. (Bangen, The Roman Curia, p. 196; Stremler, p. 608).

[3] Formerly the Secretary of the Propaganda performed the functions of the *judex relator.*

557. Consequently if the appellant or his advocate wishes to produce new proofs, papers or documents, he must produce them before this reporting judge. These new or additional proofs or allegations, as submitted to the *judex relator*, are then communicated to the *procurator generalis fisci* who is attached to the Sacred Congregation, and who represents and defends the appellee, that is, the episcopal *curia* against which the appeal is lodged.[1] This *procurator* can reply and submit rebutting evidence.

558. When the appellant or his advocate and the appellee or *procurator generalis fisci* have submitted all their additional evidence to the *judex relator*, and the latter finds that the *Acta* of the cause are full and complete, and that consequently no further evidence is needed,[2] he closes the case, and proceeds to make up his written report or synopsis of the whole case. In this synopsis (*restrictus juris et facti, folium*), the *judex relator* or proponent must be careful to state impartially the main arguments advanced on both sides. He should not express any personal opinion on the merits of the case; nor should he lean more to one side than the other. He should simply give a clear and impartial *résumé* of the entire case, and of the main arguments or proofs of both sides, and the legal deductions that flow from them.[3]

559. The appellant's advocate is then given full access to the entire *Acta* or records of the cause, and also to the synopsis or written report of the *judex relator*, so that he may be able to prepare the written summing up (*allegationes, defensiones*) for the appellant.[4] Having thus obtained a full knowledge of the case, the appellant's advocate prepares his written defence or summing up of the whole case.[5] This

[1] Decretum cit. § XI. [2] Bangen, The Roman Curia, pp. 84. 15. 169. 170. 196.
[3] Stremler l. c., p 606.
[4] Decretum cit. §. vii; S. C. EE. et RR. 26 Martii, 1886; Acta S. Sedis vol. 19. p. 296
[5] According to a recent disposition of the Sacred Congregation EE. et RR.,

summing up is then printed with the permission of the *judex relator* and distributed among the Cardinals of the Sacred Congregation some days in advance of the full meeting which is to decide the case.[1] A day is then fixed on which the case will be proposed and decided in the full Congregation of the Cardinals.[2]

560. The *procurator generalis fisci* and the *judex relator* are present at this meeting.[3] The latter states the whole case to their Eminences, giving at the same time the substance of the written deductions or summing up of the appellant's advocate.[4] The *procurator generalis* defends the *curia* against which the appeal is lodged.[5] Then the Cardinals will render their decision, by a majority vote. The *judex relator* and the *procurator generalis* have no vote.[6]

561. Against the decision of the Sacred Congregation, there is, of course, no appeal. Yet it is the custom of the Sacred Congregation to grant to the parties a new hearing called *revisio*, on the terms indicated in article xiv. of the Decree of the S. C. EE. et RR., dated December, 18, 1835.[7]

Dated March 26, 1886, this summing up may, if the Cardinal Prefect thinks it proper, be communicated to the diocesan prosecutor of the *curia a qua*, who may reply to it in writing. The reply of this prosecutor is communicated by the *judex relator* to the appellant's advocate, who in turn has the right to reply in writing. No doubt this enactment will also be adopted by the S. C. de Prop. Fide.

[1] Decretum, 1835 cit. § vii. et viii. [2] Ib., § ix. [3] Ib., § x.

[4] Ib.; Cf. Droste, p. 147.

[5] According to the decree of the S. C. EE. et RR. of 1835, which is incorporated in the Instruction *Cum Magnopere*, the advocate of the accused who is the appellant is not allowed to be present at this meeting. But on June 6, 1847, the S. C. EE. et RR., issued a decree giving the advocate of the accused, or of the appellant, the right to be present at this meeting and to make an oral summing up. However this same Sacred Congregation, on the 26 of March 1886, issued this disposition: "Omnino autem excluditur Defensoris et Procuratoris Fisci praesentia in comitiis Cardinalium, quando causa resolvenda proponitur." (Acta S. Sedis. vol. xix., p. 296, 297, 298).

[6] Decretum cit. § xii.

[7] See our *Elements*, vol. ii., n. 1363, sq. where we show how and when this new hearing is usually granted.

Note.—All the above rules governing appeals to the Holy See, from the sentence of the metropolitan acting as judge *ad quem* apply also to appeals from Ordinaries acting as judges of the first instance. For, as we say in our *Elements*, Vol. I., n. 452. it is allowed to pass over the metropolitan and appeal directly to the Holy See against the sentence of one's ordinary.

CHAPTER VII.

SEVERAL OTHER QUESTIONS TREATED BY THE INSTRUCTION.

ART. XLII.

How the Ordinary is to Act, when an Ecclesiastic is placed on Trial before the Civil Court.

XLII. "Si clericus ob communes reatus a civili potestate privilegio fori non obstante processui ac judicio subjiciatur, Ordinarius summariam informationem criminis assumit, ac inquirit, num ad normam sacrorum canonum infamiæ, irregularitati, vel alii Ecclesiasticæ sanctioni locus esse possit.

§ 1. Pendente judicio vel imputato in carcere detento prudens consilium erit, ut Ordinarius ordinationes mere provisorias adhibeat.

§ 2. Judicio absoluto si liber accusatus remittatur, curia Episcopalis juxta informationes ut supra assumptas, ea ratione procedat, quæ in hac instructione constituitur."

562. According to the sacred canons,[1] an ecclesiastic is amenable only to the ecclesiastical and not to the secular courts, so far as regards the punishment of offences whether strictly ecclesiastical or common, committed by him. This privilege, which is called *privilegium fori* was recognized and respected in former days, by Catholic governments. But at present, it is no longer recognized by any government. In the United States, also, ecclesiastics are amenable, by law, to the secular courts, for offences or crimes committed by them against the law.[2]

563. The *Instruction*, therefore, taking this fact into consideration, enacts in the present article, that when an ecclesiastic, notwithstanding the *privilegium fori*, is put on

[1] Cap. 16, de Vita et hon. cler. (iii. 1); cap. 25, de sent. excom. (v. 39).

[2] Our *Elements*, vol. i., n. 456.

trial and punished or imprisoned by the secular court, for common offences, the Ordinary will act prudently, if he does not, as long as the case is before the secular courts, take any decisive steps, but contents himself with adopting provisional measures.

Art. XLIII.

When Ordinaries should Consult the Holy See. Nullity of the Proceedings.

XLII. "In casibus dubiis diversisque in praxi difficultatibus Ordinarii Sacram hanc Congregationem consulant, ut contentiones et nullitates actorum divitent."

§ 1. *Questions addressed to the Holy See.*

564. No lawgiver can foresee or provide in his law for every case, or practical difficulty that may occur. Hence it becomes not unfrequently necessary to consult either the lawgiver himself for an authentic explanation of his law, or learned men, for a doctrinal exposition. Accordingly, the present article decrees, that when doubts and practical difficulties come up, the Ordinary shall consult the Holy See, in order that he may thus avoid contentions and the nullity of the proceedings. In regard to consultations of this kind, see our *Elements of Ecclesiastical Law*, Vol. II., n. 1370 sq.

565. As a rule, the Holy See does not give official answers or authentic explanations to questions which are put by *private persons*, but only to those which are addressed to it by *Ordinaries*. We say, as a rule; for sometimes, where there are grave reasons, the Holy See deviates from this rule. We ourselves have received directly from the Propaganda authentic explanations in answer to questions (*dubia*) proposed by us to the Sacred Congregation.

§ 2. *Nullity of the proceedings.—Complaint of nullity.*

566. The rule of law is: "*Quæ contra jus fiunt, debent utique pro infectis haberi.*"[1] Hence, all canonists teach that the omission of a substantial formality during the trial, *vitiates* and *annuls* the entire proceedings. That these principles apply also to the *Instruction* is apparent from the words of the present article—"ut *nullitatem* actorum divitent," and also from the words of article x.: *servatis semper in tota sua substantia justitiæ regulis.* When the trial is null by defect in the proceedings, the sentence passed after such trial, will also be null and void, and of no effect whatever. For the law prescribes, indeed, that the guilty shall be punished: but it prescribes also, that they shall be punished *by the forms of law.* These forms are considered by the law *essential means* of finding out the truth.

567. Here it is well to call attention to the difference between *unjust* and *invalid* sentences or acts. As we have just seen, a sentence is *invalid* when, for instance, an essential formality has been omitted during the proceedings or trial;[2] it is *unjust*, when there is either no crime, or one which is not sufficiently grievous to warrant the sentence.[3] From this it will be seen, that a sentence may be valid *in foro externo* and yet very unjust. Thus, a person who is perfectly innocent, may yet be juridically and legally convicted of crime. All the formalities may have been scrupulously observed during his trial. But the evidence was false; the witnesses were perjured.

568. Having explained the main difference between unjust and invalid sentences, we shall now describe the remedies which the sacred canons furnish against both these kinds of sentences. Against an *unjust* sentence, the *appeal* is the proper means of redress: Against an *invalid* sen-

[1] Reg. 64, de Reg. Jur. in 6.
[2] Nicollis, Praxis Can. vol. I. p. 241.
[3] München l. c., vol. i., p. 512, 513.

tence, the *complaint of nullity* is the ordinary remedy. We have already dwelt at considerable length upon appeals. We shall now say a few words on the complaint of nullity.

569. What is meant by the complaint of nullity—*querela, oppositio nullitatis?* In how many ways does a sentence become null and void? How and before whom is the complaint of nullity to be made? For the answer, see our *Elements*, vol. 2. Nos. 1357 sq.

570. In what causes can the complaint of nullity be made? Not only in civil, but also in criminal and disciplinary causes, and, consequently, also in the causes to which the *Instruction* extends.[1]

571. *Formalities to be observed in making the complaint of nullity.*—1. The complaint of nullity is far more privileged than the right of appeal. Thus the appeal, as we have seen, must be made within *ten* days; the complaint of nullity can be made at any time within *thirty years* from the date of sentence, and, in some cases, even *for ever.*

2. Again, as we have seen, a person condemned cannot appeal, after *three* sentences of the same tenor (*tres sententiæ conformes*) have been pronounced against him: whereas he can make the complaint of nullity, even after three or more sentences of the same import have been passed against him. For, an invalid act or sentence does not become valid by a subsequent sentence. Thus the rule of law is: "Non firmatur tractu temporis, quod de jure ab initio non subsistit."[2]

3. Moreover, the person making the complaint of nullity, is not bound to observe any formality in making it. It is not required that he should state that he feels wronged by the sentence, but simply that it is null and void.[3]

4. The complaint of nullity has a *suspensive effect*,[4] just like appeals proper, except when it is made by a person

[1] Our *Elements*, vol. ii., n. 1356.
[2] Reg. 18 de Reg. Jur in 6.
[3] München, l. c., vol. i., p. 588.
[4] Ib.

against whom *three* uniform sentences (*tres sententiæ conformes*,) have been pronounced; in this latter case, it has merely a devolutive effect.[1]

5. The complaint of nullity, like appeals proper, may be made to the next higher superior—*v.g.*, from the Bishop to the Metropolitan, or also directly to the Holy See. When this higher judge finds upon due examination that the complaint is well-founded, he pronounces the sentence complained of, null and void. The effect of this declaration of nullity is that a new trial has to be given to the accused by the curia which pronounced the invalid sentence.[2]

§ 3. *Reinstatement.—De in integrum restitutione.*

572. In connection with remedies against sentences and acts of the superior, we shall briefly refer here to two other remedies, namely reinstatement and recourse. What is meant by *reinstatement* (*in integrum restitutio*)? When, to whom, how, for what cause, is it granted? For the answer, see our *Elements*, Vol. II., Nos. 1374 sq.

573. *Q.* In what causes or matters is reinstatement granted?

A. In the full sense of the term, it is given only in *civil* causes. We say, *in the full sense;* for in a restricted sense, it is granted also in *criminal* and *disciplinary* causes, and that not only to *minors* but also to *majors* or adults, provided there is just cause as explained in our *Elements*, Vol. II., 1381.[3] However, in criminal causes, it can be granted by the Holy See only;[4] whereas in civil causes, it can as a rule, be given by the next higher judge, *v.g.*, by the Metropolitan.

574. Of course, the reinstatement is granted only where it is not allowed to make the complaint of nullity, or even to appeal, *v.g.*, where *three* similar sentences have been al-

[1] Droste p. 150. [2] Droste p. 150. [3] Droste p. 150.
[4] München, l. c., vol. i., p. 572.

ready pronounced against a person. For the reinstatement is an *extraordinary* remedy; and is therefore given, only when the *ordinary* remedies are not available.

Peremptory exceptions (*exceptiones peremptoriæ, perpetuæ*) are also a species of redress against sentences or acts of the superior. As a rule, however, they are made before the final sentence is pronounced. See our *Elements*, Vol. II., n. 1026, sq.

§ 4. *Recourse* (*recursus, supplicatio.*)

575. Even where an accused person who is condemned, has no longer any legal redress whatever; where for instance, he has no right to appeal, or if he had it, he has lost it *v.g.*, by not appealing in the proper time; or where he cannot make the complaint of nullity, or be granted reinstatement, he has still a last means of redress—namely the privilege to have humble recourse to the Supreme Pontiff, with the request that his wrongs be righted. This remedy is granted not strictly as a *right*, but rather as a *favor*, and accords well with the paternal spirit of the church which follows the rules of equity rather than of strict justice. We have fully described this remedy in the present treatise and also in our *Elements*, Vol. I., n. 443; Vol. II., n. 1363, sq.

Art. XLIV.

When can an Episcopal Curia be condemned to pay costs and damages?

XLIV. "Haud ita facile curiæ episcopales ad damna vel expensas resarciendas damnari poterunt; quoties enim ex processu informativo indicia sufficientia ad agendum contra inquisitum appareant, judex appellationis a talibus damnationibus abstineat, cum ea indicia sufficiant ut in judice, qui antea processit, ea vera et propria calumnia excludatur, quæ ad hujusmodi damnationem requiritur."

576. This article points out, confirms and applies to this country the general law of the Church, as laid down in the

sacred canons, concerning those who falsely accuse others of crime before an ecclesiastical judicial tribunal. Let us now examine what is here meant by false accusation; who are guilty of it; what punishment it entails.

577. I. The making of a false accusation (*calumnia*), as here understood, is the crime by which a person knowingly and maliciously charges another person falsely, with an offence before a judicial tribunal.[1] We say *crime;* that the action in question is a crime, nay, a heinous crime is too plain to admit of discussion. We say also, *before a judicial tribunal;* for if a person accuses another wrongfully of crime outside of a judicial tribunal or court of justice he is indeed guilty of slander or calumny, but not of false accusation, the one being an extrajudicial, the other a judicial calumny.[2] Hence, also, on account of the resemblance between the two, the false accusation of which we here speak is called *calumnia*, just the same as the extra judicial calumny.

578. II. Who are guilty of this crime? All those, and only those who *knowingly* and *maliciously* accuse another wrongfully in an ecclesiastical court of justice. Consequently those who make an accusation wrongfully indeed, but yet *without malice*, do not commit this crime. However, it must be observed that the law of the Church regards a person as a judicial calumniator, and therefore guilty of malicious accusation, *first*, when it is positively proven—*v.g.*, by the calumniator's own judicial confession, or by witnesses or other legal proof, that he did maliciously make a wrong accusation;[3] *secondly*, when he fails to prove in court the crime which he has charged upon a person, even though it

[1] L. 1, ff., S.C. Turpil.;Cap. i., de Cal. (v. 2); Reiff., l., 5 t. 2. n. 2.

[2] Reiff., l., c.

[3] Such an accuser is called *calumniator verus*, and the false accusation of which he is guilty, *calumnia vera.* Schmalzg., l. 5 t. 2. n. 1, 2, 3.

be not shown that he was actuated by malice or ill-will.[1] For a person who calls another into court for crime, ought to have sufficient proofs ready, and not to rush into court without good and solid reasons for believing the accused guilty. Hence, all persons who make a judicial charge, except where they do so by virtue of their office, and who fail to prove it, are *by that very fact, and without any further proof whatever*, regarded by the law of the Church, as guilty of malicious accusation, and unless they can legally prove (and the burden of proof lies upon them) the absence of malice, they incur the same penalties as though they had been legally shown to be guilty of malice.[2]

579. We say, *except where they do so by virtue of their office ;* consequently a diocesan prosecutor (*procurator fiscalis*) who fails to establish the charge preferred by him is not presumed by the law of the Church guilty of malicious prosecution from the sole fact of his having failed to prove the guilt of the accused. For, the fact that he makes the charge, not altogether of his own free choice, but rather because he is obliged to do so by virtue of his office excuses him from presumptive calumny (*calumnia præsumpta*) though not from real or true calumny (*calumnia vera*).[3] Hence, in order that an episcopal curia, or ecclesiastical judge, or diocesan prosecutor can be regarded as guilty of malicious prosecution, and punished accordingly,—*v.g.*, obliged to pay the expenses of the trial, and also damages—it is not sufficient that they should fail to prove the guilt of the accused ; it must, moreover, be shown that they were actuated by ill-will, or that they made the charge inconsiderately and rashly, *i.e.*,—without having previously, namely in the *processus informativus*, obtained sufficient proof for be-

[1] Such a one is styled *calumniator præsumptus*, and his accusation *calumnia præsumpta.*

[2] Can. 2, 3, and 4. Causa ii. Q. iii. ; Reiff. l., 5. t. 2. n. 3. sq.

[3] L. 2, 3, 4. C. de delatoribus (x. 11) ; Schmalzg. l., c. n. 3. ; Reiff. l., c. n. 5.

lieving the accused guilty. This teaching is clearly laid down in the present article of the Instruction, which teaches that the judge *ad quem* shall not condemn episcopal courts to pay the costs and damages, unless it appears that they put the accused on trial, without having previously obtained sufficient proof of guilt.

580. III. What are the punishments inflicted by the law of the Church upon calumniators, presumptive as well as real? 1. They are to be condemned to refund to the accused all the expenses of the trial or proceedings, and also to compensate him for any loss or damage he may have sustained.[1] 2. They incur infamy of law (*infamia juris*,[2]) though only after being judicially declared calumniators.[3] 3. They should, even at present, be visited with the *pœna talionis*.[4] 4. An Ecclesiastic who is guilty of falsely accusing another Ecclesiastic should be deprived of his benefice, and exiled.[5]

For fuller explanations of this whole subject, see our *Elements of Ecclesiastical Law*, Vol. II., Nos. 1202 sq.

[1] Reiff., l., c. n. 6; Schmalzg., l., c. n. 11.
[2] Can. 1. c. 2. q. 3.
[3] Reiff., l. c., n. 7, 8.
[4] Schmalzg., l., c. n. 12.
[5] Cap. 1, de cal. (v. 2); Reiff., l., c. n. 10.

CHAPTER VIII.

PRESENT STATUS OF OUR RECTORS WHO ARE NOT IRREMOVABLE, UNDER THE INSTRUCTION "CUM MAGNOPERE."

ART. XLV.

Dismissal and transfer of our Rectors who are not irremovable.

XLV. "Concilii Plenarii Baltimorensis ii. decreta n. 125 quoad naturam missionum, et n. 77, 108 quoad juridicos effectus remotionis missionariorum ab officio, nullatenus innovata seu infirmata intelliguntur, salvis iis quæ recentius de Parochis seu Rectoribus inamovibilibus constituta sunt."

§ 1. *Dismissal of our removable rectors—*

Privatio missionis, remotio definitiva a munere.

581. The present article points out the status which our rectors who are not irremovable, possess under the present *Instruction.* The article is, with the exception of the last clause—salvis iis etc.—which refers to our irremovable rectors, word for word the same as the declaration issued by the S.C. de Prop. Fide, concerning the meaning of the Instruction of July 20, 1878. This will appear from these words of the *Responsum ad Dubia*: "Instructio dei 20 Julii, 1878, lata est de casibus, in quibus ecclesiastica poena seu censura sit infligenda, aut gravi disciplinari coercitioni sit locus. *Hinc Concilii Plenarii Baltimorensis II. decreta N.* 125, *quoad naturam missionum, N.N.* 77, 108, *quoad juridicos effectus remotionis missionariorum ab officio nullatenus innovata seu infirmata intelliguntur.*"[1]

[1] Our *Elements*, vol. 2, n. 422.

582. Hence the status of our rectors, who are not irremovable is similar, under the present *Instruction*, to what it was under the Instruction of July 20, 1878. In other words, as under the Instruction of 1878, so also under the present *Instruction*, these rectors remain indeed *amovibiles;* but yet (*a*) they should not be *transferred* against their will without grave and reasonable cause; (*b*) nor can they be *dismissed* or absolutely removed from their missions, except as a rule, in punishment of crime, and by trial, as outlined in the Instruction *Cum Magnopere*. In order to understand this whole question better, it will not be amiss to glance at the history of the discipline prevalent in the United States, respecting the removal of Rectors.

583. This discipline may be divided into three periods. The *first* extends from the earliest beginnings of the Church in the United States, down to the year 1878. It is thus described by the Second Plenary Council of Baltimore, in decree No. 125: "Parochialis juris, parœciæ et parochi nomina usurpando, nullatenus intendimus Ecclesiæ cujuslebet Rectori jus, ut aiunt, *inamovibilitatis* tribuere; aut potestatem illam tollere seu ullo modo imminuere, quam ex recepta in his provinciis disciplina habet episcopus quemvis sacerdotem munere privandi aut alio transferendi." Accordingly all our Rectors were *amovibiles* during this period: that is, they could be definitively removed from their missions without a canonical cause and without a canonical or solemn trial, but not, as a rule, without a crime, nor without a summary trial. Thus, while the Second Plenary Council of Baltimore decreed under Nos. 108 and 125 that our Rectors were all *amovibiles*, it strictly commanded at the same time, under No. 77, that they could not be deprived of their missions, in punishment of crime, without a trial before the Bishop and two priests acting as assessors with a decisive vote.[1]

[1] See our Counter-Points page 34.

584. *Second period.*—On July 20, 1878, the S. C. de P. F. issued the Instruction, *Quamvis*, which, without making our Rectors canonically irremovable, and therefore without abrogating the Baltimore decrees No. 125 in regard to the nature of our missions and Nos. 77 and 108 respecting the juridical effects of dismissals, yet ordained that no rector whatever could be validly dismissed from, or deprived of, his parish or mission, in punishment of offences without a trial as outlined in the Instruction. The Instruction then, of 1878, left all our Rectors or Pastors *amovibiles*, and made no change in their status, except that it laid down a more perfect form of trial than that of No. 77 of the second Plenary Council, and expressly and strictly commanded that in future no pastor or rector whatever, could be validly dismissed in punishment of crime from his mission or parish without having been previously given a trial before the commision of Investigation, in the manner laid down in said Instruction. Thus the Instruction of 1878, authentically declared that the dismissal of a removable rector, in punishment of crime was *a causa criminalis* and thus fell within the Instruction.

585. *Third period.*—The *Third Plenary Council of Baltimore* held in 1884, which we attended, as the theologian of our Ordinary has proceeded a step farther, and in accordance with the *schema* sent from Rome, has ordained that one rector out of every ten is to be canonically irremovable, just like canonical parish priests proper. The *Council* makes no enactment whatever in regard to rectors who are not made irremovable. According to our present legislation, therefore, we have two classes of Rectors or Pastors in charge of our missions or congregations, namely removable and irremovable.

586. The present article of the *Instruction* expressly points out this legislation and accordingly enacts that the Baltimore decree No. 125, which declares that all our Rectors are *amovibiles*, remains in force indeed with regard to those rec-

tors whose Churches lack the conditions prescribed by the *Third Plenary Council*, and who are consequently not made *inamovibiles*, but is of course abrogated in regard to irremovable rectors. But does it follow from this, that rectors who are *amovibiles* can be absolutely removed from their mission or parish, *without any trial?* It does not. For, as we have seen, the S. C. de P. F. in its response to the questions (*ad dubia*) proposed by our Bishops concerning the Instruction of 1878, also declared that the Baltimore decree No. 125, which made all our rectors *amovibiles*, remained in full force; and yet the Sacred Congregation decreed at the same time, that these rectors, while remaining *amovibiles* according to No. 125 of the Sacred Plenary Council, could nevertheless not be validly dismissed in punishment of crime save upon a trial before the commission.

587. Thus the Sacred Congregation, by decreeing that the dismissal of a removable rector in punishment of crime could not take place without a previous trial, decreed by that very fact, or rather declared that such dismissal was a *causa criminalis* and *disciplinaris*. Hence, this dismissal cannot be imposed without a previous trial, under the present *Instruction*, just as it could not, under that of 1878.

588. If the contrary were true, it would follow that the condition of these rectors is worse now than it was under the Instruction of 1878; that therefore, by the present *Instruction*, the Holy See had withdrawn the benefits it had conferred upon these rectors by the Instruction of 1878. Now, this assertion would be derogatory to the Holy See. For, the rule of law, as established by the Pontiffs themselves is: "Decet concessum a principe (Papa) beneficium esse mansurum."[1] Another rule of law is: "Quod semel placuit, amplius displicere non potest."[2]

589. This will appear still more clearly, when we consider

[1] Bonifacius VIII., Reg. 16. de Reg. Juris in 6°. [2] Ib., Reg. 21.

the analogy that exists between the Instruction of 1878 and that of 1884. Both Instructions have the same object and extend to the same range of subjects or causes, namely criminal and disciplinary causes of ecclesiastics. This is manifest from the very heading of these two Instructions, which is the same in both. Now the S. C. de P. F. in its authentic declarations concerning the Instruction of 1878, has officially declared as we have seen that the dismissal of a removable rector in punishment of crime is a criminal and disciplinary cause, and therefore cannot be validly inflicted without the prescribed trial.

590. Moreover as we have seen, wherever—*v.g.*, in the poor and scattered dioceses of the far West—the *Instructio Cum Magnopere* cannot be observed as yet, the Instruction of 1878, together with the *ad dubia*, must be observed *ad interim*. Now the latter expressly enacts that a rector who is *amovibilis* cannot be deprived of his mission in punishment of crime, save by trial. Hence, if it were true that under the Instruction *Cum Magnopere* a removable rector could be dismissed from his mission, without a trial, it would follow that in the poorer and smaller dioceses where the Instruction of 1878 obtains, removable rectors could not be dismissed without trial, whereas in the larger and more fully organized dioceses, where the latest *Instruction* is in force, these same rectors could be absolutely removed without any trial. It is manifest therefore that under the present *Instruction Cum Magnopere* our removable rectors cannot be dismissed in punishment of crime save by a trial, as outlined in this Instruction; and that as a rule, the dismissal cannot be inflicted except for crime.

591. We have just said, that as under the Instruction of 1878, so also under the present *Instruction*, a removable rector cannot as a rule, be dismissed from his mission save (*a*) for *crimes*, (*b*) and by *trial*. This is in harmony with the letter and spirit of the general law of the church. For it is a

general principle of canon law, laid down by Pope Gregory, that an ecclesiastic, even though he be *amovibilis*, shall not be deprived of his office, especially when the care of souls is annexed to it, *except when he has made himself unworthy of it by crime;*[1] and then the crime must be *juridically established.* This principle is founded upon natural justice. For, the dismissal, even of a removable rector is a privation of office, and consequently also of the honor, position, dignity, and emoluments connected with the office. Hence the dismissal inflicts plainly both disgrace and pecuniary loss, and is therefore a *punishment*, nay, a punishment of the gravest kind. Now, as a rule, there can be no punishment where there is no crime; and no crime has any existence, in the eyes of the law of the church, unless its existence has been established by a trial. See our *Elements*, Vol. I., n. 418. sq. 6th. Edition. We have said, *as a rule;* for the exception, see our *Elements*, Vol. I., n. 419. Edition 6th.

592. Against this, it may be objected that if our teaching is correct, there would seem to be no longer any difference between our removable and irremovable rectors. For the answer to this objection, see our *Elements*, Vol. I., n. 418, Sixth Edition, thoroughly revised in accordance with the *Third Plenary Council of Baltimore.*

§ 2. *Transfer of Rectors, who are not Irremovable.*

593. It is certain, as we have seen, from the aim of the Sacred Congregation, and the title of the present *Instruction*, as compared with the title of the Instruction of July 20, 1878, that the former extends to the same cases as those to which the latter applied. Consequently the Instruction of 1884 has the same bearing upon the *transfer* of our removable rectors, which the Instruction of 1878 possessed. Now the bearing of the latter document upon the transfer

[1] See our *Elements*, vol. I., n. 418. Ed. 6th. 1887.

in question is thus stated by the Holy See itself: "Episcopi vero curent, ne sacerdotes sine gravi et rationabili causa de una ad aliam missionem invitos transferant."[1] This conclusion is also based on the fact that, the S. C. de Prop. Fide, in the present *Instruction*, (art. xlv.) defines the status of our removable rectors, *in the very same terms* in which it defined it in the authentic explanation of the Instruction of July 20, 1878.[2]

594. This law, to wit, that even removable rectors should not be transferred, *without grave and reasonable cause*, is in harmony with the entire legislation of the church. For as we show elsewhere, the sacred canons enact that ecclesiastics, even though they are *amovibiles* and even though they are not rectors of souls, shall not be transferred without grave cause. While this law applies to *all* ecclesiastics, it applies with peculiar force to a *rector of souls*, who should *know* his people, be a *father* to them, and who should therefore be *changed* or transferred as little as possible. See our *Elements*, Vol. I., n. 395. Sixth Edition.

595. This law holds good, especially when the transfer is *against the will of the incumbent*. For, to one who is willing, everything is easy; whereas to one who is unwilling everything is impossible. Hence such a transfer without grave and sufficient cause would be beneficial neither to the person transferred, nor to the church to which he is transferred. And yet the law of the church expressly ordains that transfers, especially involuntary, are allowed only when they are either necessary or useful either to the person transferred or to the place to which he is transferred. See our *Elements*, Vol. I., n. 392. Sixth Edition.

596. It is moreover certain that the transfer of rectors who are *amovibiles*, when made for grave and reasonable causes of utility and necessity, *which are not crimes*, must take place in

[1] S. C. de P. F. Responsum ad dubia. [2] See our *Elements*, Vol. II., n. 1536.

such a manner as not to inflict dishonor, humiliation, disgrace, pecuniary loss or other grave injury upon the person transferred.[1] In the estimation of all mankind, a transfer to a *worse* or *inferior* place is regarded as a *humiliation* and a *disgrace*, just as the transfer to a *better* place is looked upon by all as a *promotion* and an *honor*. Moreover such transfer naturally brings with it also a *diminution of income*; for the smaller the place is, the smaller will naturally be the salary or perquisites of its incumbent. Now to inflict *dishonor* and *disgrace* and *pecuniary loss* is a *punishment*, and should, as a rule, be inflicted only for *crimes*, or *offences*, which make a person unworthy of his reputation, and of the esteem of others. Consequently the transfer to an *inferior* congregation of a removable rector should take place, as a rule, only in punishment of delinquencies. See our *Elements*, Vol. I., N. 394. Sixth Edition. See also the *third* volume of our *Elements*, which will soon be published, and treat at length of dismissals, transfers and other ecclesiastical punishments.

597. This teaching is clearly pointed out by the Second Plenary Council of Baltimore, in decree N. 125. where it exhorts Bishops to transfer rectors, only for grave causes, and according to their *merits or demerits*. It is also contained in the following enactment of the Fourth Provincial Council of New York:[2] "Juxta mentem sacrorum canonum, atque ratione habita recentiorum dicisionum S. Cong. de Propaganda Fide, decernimus, præter alias causas sufficientes *ad transferendos* rectores, (amovibiles) ab una missione ad aliam, *etiam minoris æstimationis*, . . . esse sequentes." The same teaching is conveyed in the following statute of the Synod of New York, held as recently as Oct. 1886: "Quamvis itaque Rectores, quibus privilegium inamovibilitatis, secundum regulas Concili Plen. Balt. III., a nobis concessum

[1] Card. de Luca, lib. xii. de Benef. Disc. 97. n. 11. 12; Acta S. Sedis. vol. xix., p. 54.

[2] Cap. xv. art. 1.

non fuerit, de jure, ad nutum Episcopi, ut aiunt, a sua missione removeri possint, mens Nostra est eos nunquam muncre suo spoliare *vel invitos alio transferre, absque gravi omnino causa.* De hujus sufficientia in casibus occurentibus consultorum Nostrorum sententiam audiamus; et non nisi post Rectoris amovendi exceptiones perpensas remotionem decernemus." (Conc. Plen. II., n. 125; Conc. Plen. Balt. III. n. 32; Prov. IV., Cap.XV. 1).

For fuller explanations on the dismissal, and transfer of our Rectors, who are not irremovable, see our *Elements*, Vol. I., N. 395. sq; 415. sq; and especially Vol. III., which will soon be published.

APPENDIX.

I.

INSTRUCTIO

SACRÆ CONGREGATIONIS DE PROPAGANDA FIDE

DE MODO SERVANDO IN COGNOSCENDIS ET DEFINIENDIS CAUSIS CRIMINALIBUS ET DISCIPLINARIBUS CLERICORUM IN FŒDERATIS STATIBUS AMERICÆ SEPTENTRIONALIS.

Cum magnopere hujus S. Consilii intersit in ecclesiasticis judiciis eam methodum servari, quae et temporum circumstantiis opportune respondeat, et regulari justitiae administrationi, nec non Praelatorum auctoritati tuendae, querelisque reorum praecavendis par omnino sit, placuit iterum ad examen revocari ea omnia quae in hac re pro ecclesiis foederatorum Americae Septentrionalis Statuum in Intructione diei 20 Julii anni 1878 nec non in responsione ad dubia circa eamdem posterius proposita continebantur. Itaque S. C. omnibus mature perpensis, SSmo D. N. Leone PP. XIII. approbante, haec quae sequuntur observanda decrevit, praecedenti Instructione ac successiva declaratione abrogata, iis exceptis quae in hac continentur.

INSTRUCTION

OF THE SACRED CONGREGATION DE PROP. FIDE

ON THE MANNER OF PROCEEDING WHICH MUST BE OBSERVED IN THE UNITED STATES OF NORTH AMERICA, WHEN THERE IS QUESTION OF HEARING AND DECIDING CRIMINAL AND DISCIPLINARY CAUSES OF ECCLESIASTICS.

This sacred Council deems it of great importance that in ecclesiastical trials, such a method of proceeding shall be observed, as will be well adapted to the wants of the times, wholly adequate to the regular administration of justice, and fully sufficient to protect the authority of Prelates, as well as to stop complaints on the part of the accused. Hence it has pleased this Sacred Congregation to re-examine all those enactments which were made in this matter for the United States of North America, and laid down in the Instruction of July 20, 1878, and in the subsequent Response to doubts concerning the same. Therefore, the Sacred Congregation having maturely weighed all things, with the approval of our Most Holy Father, Pope Leo XIII., has decreed that what follows shall be observed in future, and that consequently the previous Instruction and the subsequent Declarations are hereby abrogated, with the exception of what is contained in the present Instruction.

I. Ordinarius pro suo pastorali munere tenetur disciplinam correptionemque clericorum ita diligenter curare, ut circa eorum mores assidue vigilet, ac remedia a canonibus statuta sive praecavendis, sive tollendis abusibus in clerum aliquando irrepentibus provide adhibeat.

II. Haec vero remedia, alia *praeventiva* sunt, alia *repressiva*. Illa quidem ad praepedienda mala, scandalorum stimulos amovendos, voluntarias occasiones et causas ad delinquendum proximas vitandas ordinantur. Haec vero eum in finem constituta sunt, ut delinquentes ad bonam frugem revocentur, ac culparum consectaria e medio tollantur.

III. Conscientiae Ordinarii remittitur cujusque remedii applicatio, canonicis praescriptionibus servatis pro casuum ac circumstantiarum gravitate.

IV. Praeventiva remedia sunt praecipue spiritualia exercitia, monitiones, praecepta.

V. Antequam vero ea adhibeantur, summaria factorum recognitio praecedat oportet : cujus notitiam Ordinarius servari curet ut, si opus sit, ad ulteriora procedere possit, et ut auctoritati ecclesiasticae superioris gradus in casu legitimi recursus totius rei rationem reddat.

VI. Canonicae monitiones vel secreto fiunt (etiam per epistolam vel per inter-

I. The Ordinary is bound, by virtue of his Pastoral office, diligently to look after the discipline and correction of Ecclesiastics. Hence he should watch assiduously over their conduct, and make wise use of the remedies established by the canons, either for the purpose of preventing or doing away with abuses which sometimes creep in among the clergy.

II. These remedies are of two kinds : some are *preventive ;* others *repressive*. The former have for their object the prevention of evils, the removing of causes of scandal, and the avoiding of voluntary proximate occasions of sin. The latter are established for the purpose of recalling the delinquent to the path of duty, and of taking away the effects of the offences committed by him.

III. The application of any of these remedies is left to the conscientious discretion of the Ordinary, provided, however, the prescriptions of the sacred canons be observed, according to the gravity of the cases and of the attendant circumstances.

IV. The following are the chief preventive remedies : spiritual exercises, admonitions, precepts.

V. However, before they are imposed upon any one, the facts calling for them, must be verified in a summary manner. The Ordinary should take care to preserve a written record of this summary verification or inquiry, in order that he may be able, if need be, to proceed to ulterior measures, and in the case of lawful recourse, to give an accurate account of the entire affair to the higher ecclesiastical authority.

VI. The canonical warnings may be made either secretly (also by letter, or

positam personam) ad modum paternae correptionis, vel servata forma legali adhibentur, ita tamen ut illarum executio ex aliquo actu pateat.

VII. Quod si monitiones in irritum cedant, Ordinarius jubet, per Curiam delinquenti analogum praeceptum intimari ita, ut in hoc explicetur, quid ipse vel facere vel vitare debeat, addita respectivae poenae ecclesiasticae comminatione, quam si praeceptum transgrediatur, incurret.

VIII. Praeceptum delinquenti a Curiae Cancellario coram Vicario generali injungitur, aut etiam coram duobus testibus ecclesiasticis vel laicis spectatae probitatis.

1°. Actus injunctionis praecepti signatura partibus preasentibus, et a delinquente etiam, si velit.

2°. Vicarius Generalis jusjurandum testibus imponere potest de secreto servando, si prudenter a natura rei, de qua agitur, id requiratur.

IX. Quod vero pertinet ad remedia repressiva sua pœnas, animadvertant Ordinarii in suo pleno vigore manere remedium extrajudiciale ex informata conscientia pro occultis reatibus a S. Concilio Tridentino constitutum C. I. § 14. de Reform.

X. In actione criminali vel ob praecepti inobservantiam, vel ob communes reatus, vel ob ecclesiasticarum legum transgressionem processus summarie et sine strepitu judicii servatis semper in tota sua substantia justitiae regulis conficiatur.

XI. Processus ex officio instruitur, vel

by means of a third person), by way of paternal corrections, or they may be given with the formalities prescribed by law, provided always that the fact of their having been really given appears from some act.

VII. If the admonitions fail to produce any effect, the Ordinary will order the *curia* to communicate to the delinquent a precept analogous to the warnings. This precept should state what the delinquent must do or avoid, and also explain what ecclesiastical punishment will be inflicted upon him, in case he disobeys the precept.

VIII. The precept will be enjoined upon the delinquent by the chancellor of the *curia*, in the presence of the Vicar-general, or of two Ecclesiastics, or laics of probity, as witnesses.

1° The act of the enjoining of the precept is signed by the parties present, and also by the delinquent, if he wishes.

2° The Vicar-General can impose upon the witnesses the oath to observe secrecy, if this is prudently required, on account of the nature of the case.

IX. So far as concerns *repressive* remedies, or punishments, Ordinaries will remember that the extrajudicial remedy established by the Council of Trent, sess. xiv., cap. 1. de Ref., for occult crimes, remains in full force.

X. In a criminal action instituted either for the violation of the precept, or for common crimes, or for the transgression of ecclesiastical laws, the trial will be conducted in a summary manner and without the nice formalities of solemn trials, yet so that the rules of justice be always observed in all their substance.

XI. The trial is begun *ex officio*, and

accepto supplici libello, vel accusatione, vel nuncio quoquomodo ad Curiam perlato, et usque ad terminum perducitur eo consilio, ut omni studio ac prudentia veritas detegatur, ac tum de crimine tum de reitate vel innocentia accusati causa eliquetur.

XII. Ubi Curiae jam constitutae sunt, compilatio processus committi potest probo ac perito viro ecclesiastico, cui assistat actuarius. In diœcesibus vero in quibus Curiae episcopales nondum possint institui, interim observanda est Instructio anni 1878 cum responsione eam subsequenti ad proposita dubia. Defensio autem rei erit in scriptis exhibenda ad normam praesentis Instructionis. Videlicet singuli Antistites in Synodo Diœcesana audito clericorum consilio, quod tamen sequi non tenentur, quinque, vel ubi adjuncta rerum id fieri non sinant, tres saltem presbyteros ex probatissimis et, quantum fieri, poterit in jure canonico peritis seligant adhujusmodi officium, ut in praedicta Instructione declaratum exstat, exercendnm. Quod si ob aliquam gravem causam Synodus haberi nequeat, quinque vel tres ut supra ecclesiastici viri per episcopum ad idem munus deputentur. Electi in officio manebunt usque ad proximam Dioecesanae Synodi celebrationem, in quavel confirmentur vel alii eorum loco designentur. Quod si interdum morte aut renuntiatione vel alia causa praecriptus consiliariorum numerus minuatur, episcopus audito consilio caeterorum ad commissionem pertinentium alios sufficiet. Porro commissio haec Consultorum jurejurando obstricta tenetur ad officium fidelitur

that either on occasion of complaints, or of accusations, or of information brought to the *curia* in any way whatever, and is carried to its end in such a manner that the truth will, in all sincerity and prudence, be discovered, and that a clear knowledge will be obtained both of the crime itself, and of the guilt or innocence of the accused.

XII. Where *curiæ* are already established, the *compilatio processus*, that is, the conduct of the trial, consisting in the gathering together of the evidence of both parties, may be entrusted to a worthy and expert ecclesiastic, who shall be attended by a secretary.

In those dioceses, however, in which Episcopal courts cannot, as yet, be established, the Instruction of 1878, together with the subsequent answer to the proposed doubts concerning the same, shall be meanwhile observed. That is, each Bishop, after having heard the advice of his clergy assembled in diocesan synod—which advice, however, he is not bound to follow—shall appoint five, or where this number cannot be had, at least three of the most worthy priests, and who are, as far as possible, learned in canon law, to discharge the duties outlined in said Instruction. Where, for some grave reason, the synod cannot be held, five or three Ecclesiastics, as above, will be appointed by the Bishop to this office. The members thus chosen will remain in office till the next diocesan synod, when they may be confirmed, or others selected in their stead. But should the prescribed number of these Councillors be sometimes lessened whether by death, resignation, or other cause; the Bishop, having taken the advice of the remaining mem-

adimplendum, et praeside Episcopo vel Vicario Generali rem suam aget.

XIII. In qualibet Curia episcopali procurator fiscalis constituetur, ut justitiæ et legi satisfiat.

XIV. Pro intimationibus vel notificationibus, si Apparitores curiae desint, utatur Episcopus persona aliqua qualificata, quae eas exbibeat, ac de hoc ipsum certiorem reddat: vel etiam a Curia per publicos tabellarios commendatae (quibus locis hoc systema vigeat) transmittantur, exquisita fide exhibitionis atque acceptionis vel repudii. Intimationes et notificationes semper in scriptis absolute fiant.

XV. Delicti fundamentum erui potest ex ipsa expositione habita in processu, quae authenticis informationibus vel confessione extrajudiciali, vel testium depositionibus confirmetur: transgressio vero praecepti ex ipso decreto et actu intimationis ad normam art. VII. et VIII. factae deducitur.

XVI. Ad admittendam vero rei culpabilitatem necessaria est probatio legabers of the Commission, will appoint others in their stead. This Commission of Consultors, which is bound by oath to discharge its duties faithfully, will conduct its proceedings under the presidency of the Bishop or his Vicar-General. However, the summing up or final defence of the accused must be made in writing, in the manner laid down in the present Instruction.

XIII. A diocesan prosecutor shall be appointed in every Episcopal *curia*, in order that justice and law may be upheld.

XIV. For delivering intimations and notices, where no official messengers are attached to the *curia*, the Bishop shall employ some reliable person, who shall deliver them, and inform him of such delivery. These notices may also be sent by the *curia*, by registered mail, (where this postal system exists), in which case, a receipt of their having been delivered and of their having been accepted or refused, should be obtained.

Intimations and notifications must always be absolutely in writing.

XV. The groundwork upon which the *procurator fiscalis* bases his charges, so far as the offence or crime is concerned, can be obtained from the information obtained in the manner indicated above, under articles v. and xi. This *exposé* or information should be corroborated by inquiries from authentic sources, or by extrajudicial confessions, or by the depositions of witnesses. This groundwork, so far as the violation of the precept is concerned is obtained from the precept itself, and the acts of its having been enjoined in accordance with articles vii. and viii.

XVI. However, in order to assume the accused guilty, so as to cite him for

lis, quae iis momentis constare debet, quibus veritas vere demonstrata elucescat, vel saltem moralis convictio inducatur quocumque rationabili dubio oppositi remoto.

XVII. Personae quae examini subjiciendae sunt, separatim audiuntur.

XVIII. Testes ad probationem, sive ad defensionem. si legalia impedimenta id non prohibeant, audiantur praestito juramento de veritate dicenda, et si res postulet, etiam de secreto servando. Itaque antequam testificentur, cum de veritate tum de secreto jurent. Eo magis de officio fideliter adimplendo et de secreto, pro rei, de qua agitur, exigentia, servando omnes juramento obstricti sint oportet, qui in instructione processus ex suo munere partem aliquam habeant.

XIX. Testes qui in locis longe dissitis vel in aliena Dioecesi degunt, mediante auctoritate ecclesiastica loci in quo manent, examinentur, in quem finem specimen factorum transmittetur : quae quidem auctoritas in responsione normas in hac Instructione contentas observabit.

XX. Si indicentur testes, qui de factis vel circumstantiis ad meritum causae substantiale spectantibus interrogandi essent, nec examinari possint, vel quia non licet aut decet eos citare in judicium, vel quia rogati adesse recusent, necesse est id in actis commemorare, eorumque deficientia suppletur testi-

trial, and eventually convict him, legal proof is required. This legal proof must be made up of such elements, as will really and fully demonstrate the truth, or at least create a moral conviction of the guilt of the accused, and remove all reasonable doubt to the contrary.

XVII. Persons who are subjected to examination, are heard separately, that is, apart from each other.

XVIII. The witnesses, whether for the prosecution or for the defence, in case the secular law does not forbid it, should take the oath to tell the truth, and also if the case demands, to observe secrecy. Consequently, before they testify, they shall swear that they will tell the truth and also observe secrecy. With greater reason, all those who take any part in the proceedings, by virtue of their office, must swear that they will discharge their duties faithfully and also observe secrecy, as far as the nature of the case requires.

XIX. Witnesses who are in a distant part of the diocese, or in a different diocese altogether, shall be examined by the ecclesiastical authority of the place where they are. For this purpose, a statement of the case is transmitted to it. This authority shall, in complying with the request to examine the witnesses, observe the rules laid down in this Instruction.

XX. Should witnesses be pointed out, who ought to be examined respecting facts or circumstances which have reference to the substantial merits of the cause, and who, nevertheless, cannot be examined, either because it is not lawful or proper to cite them to appear in court, or because, they refuse to appear, after

moniis aliorum, qui vel de relato vel aliter rem de qua quaeriter, noverint.

having been asked to appear, it becomes necessary to mention this in the acts, and their absence is supplied by the testimony of other witnesses, who know of the facts either from hearsay or from other sources.

XXI. Ubi id omne quod ad veritatem factorum constituendam et culpam accusati probandam pertinet, absolutum fuerit, imputatus intimatione scripta ad examen vocatur.

XXI. When all the evidence has been collected which goes to show the truth of the facts in the case, and the guilt of the accused, the latter is called to trial, by a written summons or intimation.

XXII. In intimatione, nisi prudentia obstet, accusationes contra reum perlatae per extensum referuntur, ut ad responsionem se praeparare possit.

XXII. In the citation, unless prudence forbids, the accusations brought against the accused, are stated in full, so that he may prepare for his defence.

XXIII. Quod si ob accusationum qualitatem vel alia de causa haud expediat, ut in intimatione exprimantur, in hac satis erit innuere, ipsum ad examen vocari ut in causa, de qua contra eum fit inquisitio, sese defendat.

XXIII. But if, on account of the character of the accusations, or of some other cause, it is not expedient to express the accusations in the citation, it will be sufficient to intimate in it, that the accused is called to trial in order to defend himself in a matter which is under investigation.

XXIV. Si ad examen accedere recuset, iterum fit intimatio, atque in ea congruum tempus peremptorium praefinitur, intra quod reus coram tribunali se sistere debeat, eique siguificatur, si non pareat, contumacem esse judicandum: quam intimationem si haud probato legitimo impedimento transgrediatur, ut contumax de facto habebitur.

XXIV. If he refuses to appear for trial, he is summoned a second time. In this second citation, a peremptory term is fixed, within which the accused must appear, and he is informed that if he fails to obey, he will be adjudged contumacious. Should he also refuse to comply with this second citation, without proving a legitimate hindrance, he shall, as a matter of fact, be regarded as contumacious.

XXV. Verum si ad examen accedat, audiatur: et ubi inductiones alicujus valoris exhibeat, eae, quantum fieri potest, accurate discutiantur.

XXV. But if he appears in court, he should be heard. And if he makes statements of any consequence, they should, as far as possible, be accurately discussed.

XXVI. Dein ac edendum est ad contestationem delicti et argumentorum, quae prostant, ut inquisitus et culpabi-

XXVI. The next step is the plea, or contestation of the offence and of the proofs extant which go to show that the

lis habeatur et in poenas canonicas incurisse censeatur.

XXVII. Inquisitus, ubi ex his noverit, quae in actis contra ipsum relata sunt, ad ea respondere potest, ac, si velit, utetur jure defensionis a se ipso in scriptis peragendæ.

XXVIII. Potest etiam, si postulet, obtinere, ut terminus ad defensionem scripto exhibendam præfigatur: maxime si ob ea quæ art. XXIII indicata sunt, responsionem ad accusationes contra se latas parare non potuerit.

XXIX. Absoluto processu redactor actorum summarium præcipuorum argumentorum. quae ex ipso elucent, conficiat

XXX. Qua die causa proponetur, inquisito fiet facultas defensionem suam per alium sacerdotem suo nomine in scriptis exhibendi. Quod si idoneum non reperiat, laicum catholicum adhibere potest. Quisque autem ex iis ab Ordinario approbandus est.

XXXI. Si vero reus defensorem deputare recuset, Ordinarius illum ex officio designabit.

XXXII. Defensor debitis sub cautelis in Cancellaria Curiae processum ejusque summarium inspiciet, ut reum tueatur; ac defensionem ante causae ipsius propositionem scripto exhibebit. Ipse quoque ad juramentum de secreto servando tenetur, quando judex indolem causae id postulare censuerit.

accused should be considered guilty and has rendered himself liable to canonical punishments.

XXVII. When the accused, from what has taken place thus far, knows all that is contained in the Acts against him, he can make his defence and therefore produce his witnesses, etc. He can also, if he wishes, make use of the right to hand in a written defence which must be signed by himself.

XXVIII. He can, moreover, if he asks for it, obtain a suitable delay to enable him to present this written defence, especially where on account of what is said in article XXIII., he has not been able to get ready his reply to the accusations brought against him.

XXIX. When the trial is over, the auditor shall make out a written synopsis of the principal evidence submitted on both sides, and of the legal deductions flowing from it.

XXX. On the day on which the final summing up will take place, the accused will have the right to make his final defence or summing up in writing, through another priest acting for him, and in his name. But if he does not find a competent priest to do this, he can employ a Catholic layman. Each of these, however, must be approved by the Ordinary.

XXXI. Should the accused decline to appoint an advocate, the Ordinary will *ex officio* designate one for him.

XXXII. The advocate will, under due precautionary measures, examine the entire process and its synopsis in the chancery of the *curia*, in order that he may be able to defend the accused. And he will hand in the defence or summing up, in writing, prior to the day on which the case is to be proposed and final sen-

XXXIII. Processus ejusque summarium ad procuratorem fiscalem mittitur, ut officio suo fungi possit. Postquam Procurator fiscalis suas conclusiones ediderit, eaedam defensori rei communicandae sunt ut ad easdem si placuerit in scriptis respondeat; tum omnia ad ordinarium remittuntur qui, ubi in plenam causae cognitionem devenerit, diem constituet in qua sententia dicenda sit.

XXXIV. Praestituta die, ab Episcopo vel Vicario Generali praesente procuratore fiscali et defensore sententia pronunciatur, ejusque pars dispositiva Cancellario dictatur, expressa mentione facta, si damnationi sit locus, sanctionis canonicae quae contra imputatum applicatur.

XXXV. Sententia reo intimetur, qui potest ad auctoritatem superioris instantiae appellationem interponere.

XXXVI. In appellatione observentur normae expressae in Constit. sa. me. Benedicti XIV. *Ad Militantis* diei 30 Martii 1742 ac caeterae indictae a S. C. Episcoporum et RR. decreto diei 18 Decembris 1835 et epistola circulari diei 1 Aug. 1851.

XXXVII. Intra terminum decem dierum a notificatione sententiae interpositio appellationis fieri debet, quo elapso tempore sententiae executio locum habet.

tence pronounced. He is also obliged to take the oath to observe secrecy, should the judge believe that the nature of the case demands it.

XXXIII. The trial and its *résumè* are sent to the *procurator fiscalis*, in order that he may be able to fulfil the duties of his office. After the *procurator fiscalis* has handed in his written summing up, the latter is communicated to the advocate of the accused, so that he may, if he chooses, reply to it in writing. Thereupon all the acts are remitted to the Ordinary who, after acquiring a full knowledge of the case, fixes a day for the pronouncing of the final sentence.

XXXIV. On the day appointed, the Bishop or his Vicar-General pronounces the sentence, in the presence of the diocesan prosecutor and of the advocate of the accused, dictating its dispositive part to the chancellor, and making express mention, in case he pronounces condemnatory sentence, of the ecclesiastical law sanctioning the punishment, which is applied to the accused.

XXXV. The sentence shall then be delivered to the accused, who can appeal to the authority of the higher instance.

XXXVI. In the appeal, it will be necessary to observe the regulations made by Pope Benedict XIV., of holy memory, in his constitution *Ad Militantis*, March 30, 1742, as also those rules which are laid down by the Sacred Congregation of Bishops and Regulars, in the decree of Dec. 18, 1835, and in the circular of Aug. 1, 1851.

XXXVII. The appeal should be interposed within the space of ten days from the time the sentence was served on the accused. When this term has elapsed, and no appeal has been made, the sentence can be executed.

XXXVIII. Appellatione interposita, continuo Curia ad auctoritatem ecclesiasticam superioris instantiae omnia acta causae in suis autogaphis, id est processum, ejus summarium, defensionem ac sententiam mittit.

XXXIX. Haec porro superioris instantiae auctoritas appellatione cognita appellanti injungit, ut intra triginta dies defensorem deputet, qui ab ipsa approbandus est.

XL. Eo termino peremptorio frustra elapso, censetur reus beneficio appellationis renuntiasse, quam propterea judex gradus superioris peremptam declarat.

XLI. In appellatione a sententia Curiae episcopalis ad metropolitanam archiepiscopus in causa cognoscenda ac definienda eadem procedendi methodo utetur, quae in hac instructione indicatur.

XLII. Si clericus ob communes reatus a civili potestate privilegio fori non obstante processui ac judicio subjiciatur, Ordinarius summariam informationem criminis assumit, ac inquirit, num ad normam sacrorum canonum infamiae, irregularitati, vel alii ecclesiasticae sanctioni locus esse possit.

§ 1. Pendente judicio vel imputato in carcere detento prudens consilium erit, ut Ordinarius ordinationes mere provisorias adhibeat.

§ 3. Judicio absoluto si liber accusatus remittatur, Curia episcopalis juxta informationes ut supra assumptas ea ratione

XXXVIII. However, when the appeal is interposed, the *curia* shall forthwith transmit to the ecclesiastical authority of the higher instance all the acts of the cause, in their originals, namely, the trial, its synopsis, the summing up, and the sentence.

XXXIX. This authority of the higher instance, having been informed of the appeal, commands the appellant to appoint, within thirty days, an advocate for himself, who must be approved by it.

XL. When the peremptory space of 30 days has expired, and the accused has not presented any advocate, he is regarded as having given up the benefit of appealing. Consequently, the judge of the higher instance shall declare the appeal extinct.

XLI. In the appeal from the sentence of the Episcopal *curia* to the Metropolitan's *curia*, the archbishop will, in hearing and deciding the cause, use the same mode of proceeding which is outlined in this Instruction.

XLII. Where an ecclesiastic notwithstanding the privilege of exemption from the secular forum, is placed on trial by the civil authorities for common offences, the Ordinary will make a summary inquiry into the alleged crime, and see whether, according to the sacred canons, the accused has made himself liable to infamy, irregularity or any other canonical punishment.

1°. Pending the trial, or while the accused is in prison, it will be advisable for the Ordinary to adopt merely provisional measures.

2°. When the trial is over, if the accused is set at liberty, the Episcopal *curia* will, according to the nature of the

procedet, quae in hac instructione constituitur.

XLIII. In casibus dubiis diversisque in praxi difficultatibus Ordinarii Sacram hanc Congregationem consulant, ut contentiones ac nullitatem actorum devitent.

XLIV. Haud ita facile Curiae episcopales ad damna vel expensas resarciendas damnari poterunt; quoties enim ex processu informativo indicia sufficientia ad agendum contra inquisitum appareant, judex appellationis a talibus damnationibus abstineat, cum ea indicia sufficiant ut in judice, qui antea processit, ea vera et propria calumnia excludatur, quæ ad hujusmodi damnationem requiritur.

XLV. Concilii plenarii Baltimorensis II. decreta N. 125 quoad naturam missionum, et N. 77. 108 quoad juridicos effectus remotionis, missionariorum ab officio, nullatenus innovata seu infirmata intelliguntur, salvis iis quae recentius de Parochis seu Rectoribus inamovibilibus constituta sunt.

information obtained as above, proceed in the manner laid down in this Instruction.

XLIII. In doubtful cases, and in the various difficulties coming up in practice Ordinaries should consult this sacred Congregation, in order that they may avoid contentions and nullity of the acts.

XLIV. Episcopal courts cannot be so easily condemned to pay costs or damages. For, whenever it appears from the informative process of the *curia a qua* that there were sufficient indications of guilt to warrant the *curia* to proceed against the accused, the judge of appeal shall abstain from the condemnations in question, since those indications of guilt are sufficient to exonerate the judge of the lower instance from that true and real calumny or false accusation which is required for these condemnations.

XLV. The decrees of the Second Plenary Council of Baltimore, No. 125, so far as regards the character of missions or congregations, and Nos. 77, 108, so far as concerns the juridical effects of the removal of missionaries from office, are in no wise changed or abrogated, excepting in so far as they are modified by the regulations which have been recently made respecting irremovable parish priests or rectors.

II.

DE APPELLATIONIBUS

ET INHIBITIONIBUS CONCEDENDIS VEL DENEGANDIS.

Benedictus Episcopus Servus Servorum Dei. Ad perpetuam rei memoriam.

Ad militantis Ecclesiæ regimen nullo meritorum Nostrorum suffragio, sed imperscrutabilis consilii altitudine evocati, inter graves curas, quas assidue pro Nostro munere sustinemus, postrema illa non est, in quam totis viribus Nobis incumbendum

esse ducimus, ut graves nimium, diuturnæ, nulloque unquam tempore intermissæ Episcoporum aliorumque ordinariam Jurisdictionem habentium querelæ adversus Majora Tribunalia atque illa etiam Nostræ Romanæ Curiæ, propositæ, tandem compescantur.

§ 1 Intimo siquidem animi Nostri moerore, cum in minoribus adhuc essemus, jamdiu intelleximus, plerosque Locorum Ordinarios conqueri, sensim abusum irrepsisse, quod ad malitiosam potentium suggestionem, a Patriarchis, Metropolitanis, Sanctæ Sedis a latere Legatis, et diversis dictæ Romanæ Curiæ Judicibus, Inhibitiones sine delectu Causæ, et rei, de qua igitur, examine, passim concedantur. Et quamvis in more positum sit, dictas Inhibitiones indebite expeditas pro causæ meritis revocari, et aboleri; remedium tamen inflicto vulneri non satis esse dicunt cum interea oporteat Episcopos aliosque inferiores Judices, in ipso causarum, et Judiciorum cursu, otiosos immorari, jus suum judicialiter asserere, et vindicare, et ad continendos in officio Populos gravia sæpe incommoda et dispendia subire.

§ 2. E contrario Nobis quoque, dum etiam in minoribus essemus, Superiorum Judicum responsiones audire contigit, asserentium, memoratas querelas inanes esse, nec ulli innixas fundamento, utpote ex hac unica re causam, et originem habentes, quod inferioribus grave est obedientiæ, ac subjectionis jugum erga majora Tribunalia, ipsisque nimis displicet, sibi subditis appellationis beneficio succurri.

§ 3. Porro cum facile hæc dissidia componi, et succrescentia litium semina avelli possint; si, quæ a Sacra Tridentina Synodo, ab Apostolicis Constitutionibus, et Congregationum Decretis provide sancita sunt, debitæ executioni mandentur: Nos idcirco ad conservandam Ecclesiæ disciplinam, restituendamque Tribunalibus formam eisdem canonicis legibus consentaneam, pro credito Nobis Apostolicæ servitutis officio, opportune duximus consulendum.

§ 4. Inhærentes itaque Decretis ejusdem Sacri Concilii, necnon Congregationis Episcoporum et Regularium, jussu et approbatione rec. mem. Clementis PP. VIII. Prædecessoris Nostri alias editis die XVI. Octobris MDC.; Itemque aliis Congregationis particularis, jussu pariter, et approbatione fel. rec. Urbani PP. VIII. similiter Prædecessoris Nostri promulgatis die V. Septembris MDCXXVI. eorumque declarationibus nuper superadditis a piæ mem. Benedicto XIII. etiam Prædecessore Nostro in Appendice Concilii Romani; aliisque Apostolicis Constitutionibus, hac de re alias editis, et innovatis, et præsertim Constitutioni piæ mem. Gregorii XV., quæ incipit: Inscrutabili, sub Datum Romæ apud Sanctum Petrum Anno Incarnationis Dominicæ MDCXXII. nonis Februarii.

§ 5. Districte præcipimus, et mandamus, ne deinceps ab exequutione Decretorum dicti Sac. Concilii Tridentini, in omnibus illis causis, et negotiis, in quibus exequutio, hujusmodi Episcopis, et Locorum Ordinariis, etiam uti Sedis Apostolicæ Delegatis, ab eodem Sacro Concilio, vel dictis Apostolicis Constitutionibus, appellatione, vel inhibitione quacumque postposita commissa est, appellatio aliqua in Tribunalibus prædictis recipiatur, vel Inhibitiones, Citationes generales, vel speciales, cum Commissione inserta, Monitoria, et alia hujusmodi, per quæ dictorum Decretorum exequutio retardetur, aut Processus ad ulteriora in eadem exequutione suspendatur, aut impediatur, quoquo modo concedantur.

§ 6. Itaque a quibuscumque Mandatis, prohibitionibus, provisionibus, et statutis tam in Visitatione, quam extra, pro Divino Cultu conservando, et augendo et præsertim circa ea quæ observanda, et evitanda sunt in celebratione Missæ, aut alio quovis modo respiciunt exequutionem Decreti Sac. Concilii Sess. 21 de Reform. cap. 8., et sess. 22. in Decret. de observ. et evit. in celebrat. Miss.

§ 7. Item a Decretis cogentibus Clericos tam Sæculares, quam Regulares, etiam Monachos, et exemptos ad publicas Processiones, servata tamen forma Constitutionis san. mem. Pii V., quæ incipit: Et si Mendicantium: Prout etiam a Decretis, et provisionibus super præcedentia inter Personas Ecclesiasticas, tam Sæculares, quam Regulares in eisdem Processionibus, vel associatione Defunctorum, delatione Umbellæ, et hujusmodi: Necnon super observatione Censurarum, etiam Episcopalium, et Festorum Diœcesis, juxta dispositionem ejusdem Sacri Concilii sess. 25, de Regular. cap. 12 et cap. 13.

§ 8. Item in omnibus iis, quæ ad curam Animarum, et Sacramentorum administrationem quoquo modo pertinent, et præsertim adversus Monitiones, Censuras, aut alias provisiones, per quas Parochi aut alii Curam animarum exercentes, diebus saltem Dominicis, et Festis Solemnibus Plebes sibi commissas salutaribus verbis pascere compelluntur, docendo ea, quæ ad salutem necessaria sunt, juxta Decretum Sacri Concilii sess. 5. de Reform. cap. 2.

§ 9. Item adversus deputationem Vicariorum etiam perpetuorum, cum assignatione congruæ, per quos Cura Animarum exerceatur, quoties plura Beneficia curata ex Dispensatione Apostolica ab aliquo obtineantur; vel quoties eadem Beneficia Curata Cathedralibus, Collegiatis, seu aliis Ecclesiis, vel Monasteriis, Beneficiis, seu Collegiis, aut piis Locis quibuscumque perpetuo unita, et annexa reperiuntur; juxta præscriptum dicti Sacri Concilii sess. 7. de Reform. cap. 5., et cap. 7., et juxta Constitutionem san. mem. Pii V., quæ incipit: Ad exequendum.

§ 10. Item adversus Visitationem Beneficiorum Curatorum, ut supra, perpetuo unitorum, necnon quarumcumque Ecclesiarum quomodolibet exemptarum, prout etiam adversus Decreta, et provisiones ab Ordinario capiendas, ut quæ in eis reparatione indigent, reparentur, et Cura Animarum, si qua illis imminet, aliisque debitis obsequiis minime defraudentur, juxta dispositionem Sacri Concilii eadem sess. 7. de Reform. cap. 8., et sess. 21. cap. 7.

§ 11. Item a Decretis, seu Mandatis, per quæ Episcopi, etiam uti Apostolicæ Sedis Delegati, in Ecclesiis Parochialibus, aut Baptismalibus, in quibus Populus ita numerosus est, ut unus Rector non possit sufficere Ecclesiasticis Sacramentis ministrandis, et Cultui Divino peragendo, cogant Rectores, vel alios, ad quos pertinet, sibi tot Sacerdotes ad hoc munus adjungere, quot sufficiant ad Sacramenta exhibenda, et Cultum Divinum celebrandum: Aut etiam invitis Rectoribus, procedant ad constitutionem novarum Parochiarum, cum assignatione competentis portionis, ubi ob locorum distantiam, sive difficultatem, Parochiani, sine magno incommodo, ad percipienda Sacramenta, et Divina Officia audienda accedere non possunt, vel denique propter paupertatem, et in cæteris casibus a jure permissis, deveniant ad uniones perpetuas aliorum Beneficiorum simplicium, non tamen Regu-

larium, juxta dispositionem Sacri Concilii sess. 21. de Reform. cap. 4., et cap. 5.. et sess. 24. similiter de Reform. cap. 13.

§ 12. Item a deputatione Coadjutorum, aut Vicariorum pro tempore, vel aliis provisionibus ab Episcopo capiendis, etiam tamquam Apostolicæ Sedis Delegato, quando illiterati, et imperiti Parochialium Ecclesiarum Rectores sacris minus apti sunt officiis, cum assignatione partis fructuum pro sufficienti illorum victu: Necnon a suspensione, atque etiam a privatione illorum, qui turpiter et scandalose vivunt, et postquam præmoniti sunt, in sua nequitia incorrigibiles perseverant, juxta præscriptum ejusdem Concilii sess. 21. de Reform. cap. 6.

§ 13. Item a translatione Beneficiorum simplicium, etiam Jurispatronatus, ex Ecclesiis, quæ vetustate, vel alias collapsæ sint, et ob eorum inopiam nequeant instaurari, vocatis iis, quorum interest, in Matrices, aut alias Ecclesias, cum omnibus emolumentis, et oneribus: prout etiam a Decretis cogentibus Patronos, Rectores, Beneficiatos, aut Parochianos, sive Populum, ad refectionem, et instaurationem Ecclesiarum Parochialium servata forma Sacri Concilii sess. 21. cap. 7.

§ 14. Item a censuris, sequestratione, et subtractione fructuum, aut aliis quibuscumque provisionibus, pro cogendis ad residentiam Parochis, cæterisque omnibus, quibus Cura Animarum incumbit, juxta Decretum ejusdem Sacri Concilii sess. 23. de Reform. cap. 1.

§ 15. Item a denegatione, revocatione, suspensione, vel restrictione, et limitatione facultatis audiendi Confessiones, respectu eorum, qui Parochiale Beneficium non obtinent, etiam si fuerint Regulares, pro excipiendis Confessionibus Sæcularium, juxta ordinationem Sacri Concilii sess. 23. cap. 15., et Prædecessorum Nostrorum Constitutiones, ac præcipue illam fel. rec. Clementis X., quæ incipit: Superna.

§ 16. Item in illis Civitatibus aut locis, ubi vel Parochiales Ecclesiæ certos non habent fines, nec earum Rectores proprium Populum, quem regant, sed promiscue petentibus Sacramenta administrant, vel etiam nullæ sunt Parochiales, a divisione, seu distinctione Parochiarum earumque ordinatione, sive institutione in titulum perpetuum juxta Decretum Sacri Concilii sess. 24. de Reform. cap. 13.

§ 17. Item a deputatione Vicarii, vel Oeconomi, cum assignatione Congruæ, pro tempore, quo vacat Ecclesia Parochialis: Prout etiam ab indictione Concursus, relatione examinatorum, necnon præelectione, et provisione Episcopi in eodem Concursu juxta definitionem Sacri Concilii eadem sess. 24. de Reform. cap. 18.

§ 18. Item a Mandatis, seu Decretis inhibentibus prædicationem, vel publicas lectiones, aut coercentibus, vel punientibus quoscumque, etiam exemptos tam Sæculares, quam Regulares, qui in alienis Ecclesiis, quæ suorum Ordinum non sunt, absque Episcopi licentia, et in Ecclesiis suis, aut suorum Ordinum, non petita illius benedictione, aut ipso contradicente, prædicare præsumpserint; juxta Decretum Sacri Concilii sess. 5. de Reform. cap. 2., et sess. 24. similiter de Reform. cap. 4., et constitutionem piæ mem. Gregorii XV., quæ incipit: Inscrutabili § fin. una cum declarationibus contentis in Constit. Clementis PP. X., quæ incipit: Superna.

§ 19. Et generaliter in omnibus iis, quæ pertinent ad Curam Animarum, et rectam Sacramentorum administrationem, adversus visitationem, correctionem, cœrcitionem

et quascumque alias provisiones Episcopi Diœcesani, etiam quoad exemptos, sive Sæculares, sive Regulares, juxta laudatam Constitutionem Gregorii XV., quæ incipit: Instructabili.

§ 20. Item adversus quascumque Provisiones, et Decreta pro conservanda, aut restituenda clausura Sanctimonialium, aut pro correctione, seu punitione eorum, qui circa Personas intra Monasteria degentes, aut circa Clausuram, vel circa Bonorum administrationem deliquerint. Prout etiam ab examine pro approbatione, vel reprobatione Confessariorum sive Regularium, sive Sæcularium, quomodocumque exemptorum, et tam ordinariorum, quam extraordinariorum, pro excipiendis confessionibus Monialium, etiam Regularibus subjectarum. Itidemque a Decretis vel aliis quibuscumque provisionibus cogentibus Administratores, sive Sæculares, sive Regulares quomodolibet exemptos, ad reddendam singulis annis rationem Bonorum ad Monasteria Sancti-Monialium hujusmodi pertinentium: Ac demum a quibuscumque Decretis super amotione Capellanorum, Sacristarum, et aliorum quorumcumque Officialium, et Ministrorum, tam Sæcularium, quam regularium ipsis Monialibus, vel eorum Ecclesiis inservientium, juxta dispositionem Sacri Concilii sess. 25. de Regular. et Monial. cap. 5., cap. 9., et cap. 10. servata tamen, quoad Regulares, et exemptos, forma prædictæ Constitutionis rec. mem. Gregorii XV., quæ incipit: Inscrutabili.

§ 21. Item adversus pastoralem Visitationem Diœcesis, et præsertim Monasteriorum, Commendatorum. Abbatiarum, Prioratuum, et Præpositurarum, in quibus non viget Regularis Observantia, necnon Beneficiorum, tam Curatorum, quam non Curatorum, Sæcularium et Regularium qualitercumque commendatorum, etiam exemptorum: Prout etiam ab exequutione eorum, quæ in ipsa Visitatione mandata, decreta, aut judicata fuerint. Necnon similiter a quibuscumque Decretis, Provisionibus, etiam extra Visitationem, pro conservatione vel Reparatione Ecclesiasticæ Disciplinæ, quoad vitam, mores, et honestatem quorumcumque Clericorum, luxum, commessationes, choreas, lusus, crimina, et sæcularia negotia fugienda, atque evitanda; juxta plura Decreta dicti Sacri Concilii, et præsertim sess 6. de Reform. cap. 4. sess. 13. cap. 1. sess. 14. cap. 4. sess. 21. cap. 8. sess. 22. cap. 1., et cap. 8., et sess. 24. cap. 10. ad formam tamen Decretorum Sac. Congr. Episcoporum de mandato san. mem. Clementis VIII. editorum Ann. MDC.

§ 22. Item a Decretis cogentibus Præsentatos, electos, vel nominatos a quibusvis Ecclesiasticis Personis, etiam Nostris et Sedes Apostolicæ Nuntiis, ad quævis Ecclesiastica Beneficia, ad se subjiciendum examini ordinarii, antequam instuantur, confirmentur, vel admittantur, quaemadmodum cavetur sess. 7. de Reform. cap. 13.

§ 23. Item a denegatione Sacrorum Ordinum, vel adscensus ad alios majores; prout etiam adversus suspensionem ab Ordinibus jam susceptis, ob crimen occultum, sive ex informata conscientia, juxta dispostionem Sacrii Concilii sess. 14. de Reform. cap. 1., et cap. 3., et sess. 21. cap. 1., et sess. 23. cap. 16.

§ 24. Item a præfixione termini, intra quem Regularis Episcopo non subditus, qui intra claustra Monasterii degat, et extra ea ita notorie deliquerit, ut Populo scandalo sit, a suo Superiore puniri debeat, ac de punitione ipse Episcopus certior fieri, juxta

Decretum Sacri Concilii sess. 25. de Regular. cap. 14., et Const. fel. recor. Clementis PP. VIII., quæ incipit: Suscepti muneris: Necnon adversus punitionem, et correctionem eorumdem Regularium, qui circa Personas intra septa degentes, aut circa Clausuram ipsam deliquerint; juxta prædictam Constitutionem Gregorii XV., quæ incipit: Inscrutabili.

§ 25. Item a Censuris, aut aliis provisionibus contra Concubinarios, et præsertim Clericos etiam retinentes domi, aut extra, Mulieres suspectas, juxta præscriptum Sacri Concilii sess. 24. de Reform. Matrim. cap. 8., sess 26. de Reform. cap. 14.

§ 26. Item adversus privationem Privilegii Fori, et alias provisiones contra Clericos non incedentes in habitu, et tonsura, et in aliis casibus a Sacro Concilio præscriptis sess. 14. de Reform. cap. 6., et sess. 23. similiter cap. 6.

§ 27. Prout etiam ab examine, approbatione, vel reprobatione Patrimonii Sacrii, Pensionis Ecclesiasticæ, aut beneficii, quoad Clericos promovendos ad Sacros Ordines; juxta dispositionem ejusdem Concilii sess. 21. de Reform. cap. 2.

§ 28. Item adversus convocationem Capituli, quam faciat Episcopus ad aliquid deliberandum, et juxta vota ipsorum Capitularium concludendum, quoties de re ad suum, vel suorum commodum spectante non agatur, juxta Decretum Sacri Concilii sess. 25. de Reform. cap. 6.

§ 29. Item a Mandatis, seu Decretis super conversione tertiæ partis fructuum, et quorumcumque proventuum, et obventionum, tam Dignitatum, quam Canonicatuum Personatuum, portionum, et officiorum, in distributiones quotidianas, earumque divisiones inter Dignitates obtinentes, et cæteros Divinis interessentes, in Ecclesiis tam Cathedralibus, quam Collegiatis, in quibus nullæ sunt distributiones hujusmodi quotidianæ, vel ita tenues, ut versimiliter negligantur; juxta Constitutionem ejusdem Concilii sess. 21. de Reform. cap. 3., et sess. 22. similiter de Reform. cap. 3.

§ 30. Item adversus exercitium facultatum Episcopis competentium super executione omnium piarum dispositionum, tam in ultima voluntate, quam inter vivos, in casibus a Jure concessis, juxta dispositionem Sacrii Concilii sess. 22. de Reform. cap. 8.

§ 31. Item a Visitatione Hospitalium, Collegiorum quorumcumque, et Confraternitatum Laicorum, Eleemosynarum, Montium Pietatis, sive Charitatis, et omnium Piorum Locorum, quomodocumque nuncupatorum, etiamsi eorum Cura ad Laicos pertineat, aut exemptionis Privilegio sint munita: Ac denique a cognitione, et exequutione eorum omnium, quæ ad Dei Cultum, aut animarum salutem, seu Pauperes sustentandos instituta sunt juxta dictum Decretum Sacri Concilii sess. 22. de Reform. cap. 8.

§ 32. Item a Decretis, seu Mandatis cogentibus Administratores, tam Ecclesiasticos, quam Laicos, etiam exemptos, Fabricæ cujusvis Ecclesiæ, etiam Cathedralis Hospitalis, Confraternitatis, Eleem. synæ, Montis Pietatis, et quorumcumque Piorum locorum, ad reddendam singulis annis ipsi Ordinario rationem suæ administrationis, nisi aliud in institutione et ordinatione talis Ecclesiæ, seu Fabricæ expresse cautum fuerit; juxta Decreta Sacri Concilii sess. 7. de Reform. cap. 15., sess. 22. cap. 9, et sess. 25. cap. 8.

§ 33. Item a Decretis compellentibus Notarios, etiam Apostolica, Imperiali, aut Regia auctoritate creatos, et scribentes in Causis Ecclesiasticis, vel Spiritualibus, ad se subjiciendum examini, Eorumque remotione, vel suspensione in casu delicti, vel imperitiæ; juxta præscriptum Sacri Concilii dicta sess. 22. cap. 10.

§ 34. Item ab erectione Seminarii, et taxatione quarumcumque Dignitatum. Personatuum, Officiorum, Præbendarum, Portionum, Abbatiarum, et Prioratuum cujuscumque Ordinis, etiam Regularis, Hospitalium, quæ dantur in titulum, vel administrationem, et Beneficiorum quorumcumque, etiam Regularium, etiam Jurispatronatus, etiam exemptorum, etiam nullius Diœcesis, vel aliis Ecclesiis Monasteriis, Hospitalibus, et aliis quibusvis Locis piis, etiam exemptis, annexorum, ac quorumcumque aliorum Ecclesiasticorum reditnum, seu proventuum ad Fabricas Ecclesiarum, Confraternitates, et Monasteria omnia, non tamen Mendicantium, pertinentium, necnon Decimarum quacumque ratione ad Laicos, atque etiam Milites cujuscumque Militiæ aut Ordinis, Hierosolymitano excepto, spectantium, pro ejusdem Seminarii manutentione: prout etiam ab unione, et applicatione aliquot Beneficiorum simplicium; necnon a Decretis cogentibus eos, qui Scholasterias obtinent, vel quibus lectionis, vel Doctrinæ munus est annexum, ad docendum per se ipsos, vel idoneos substitutos; et generaliter a Mandatis et provisionibus, quæ quoquo modo respiciunt Curam, directionem, et administrationem Seminarii, plenamque exequutionem Decreti editi a Sacro Concilio super Collegio Puerorum in singulis Cathedralibus instituendo, sess. 23. de Reform. cap. 18.

§ 35. Item a Mandatis, seu Decretis cogentibus Oeconomos, Vicarios Capitulares, ad reddendam rationem Administrationis per eos gestæ Sede Episcopali vacante, juxta præscriptum Sacri Concilii sess. 24. de Reform. cap. 16.

§ 36. Item a comminatione excommunicationis a Jure latæ, et a Sententia excommunicationis latæ ab homine suspensionis, et interdicti, nisi appellatio fuerit interposita ex capite nullitatis: Et e converso a Sententia absolutionis ab eisdem Censuris Ecclesiasticis.

§ 37. Et generaliter ab exequutione aliorum quorumcumque Decretorum dicti Sacri Concilii Tridentini, Episcopis, atque Ordinariis locorum demandata ab ipso Concilio, et in Constitutione fel. rec. Pii Papæ IV., quæ incipit: Benedictus Deus.

§ 38. Volumus, præcipimus et mandamus, quod ab Archiepiscopis, Patriarchis, seu Primatibus, aliisque Judicibus Ecclesiasticis, etiam Nostris et Sedis Apostolicæ Nuntiis, vel de latere Legatis, etiam Sanctæ Romanæ Ecclesiæ Cardinalibus, atque etiam Cameræ nostræ generali Auditore, Signaturæ Justitiæ Præfecto, cæterisque Judicibus Romanæ Curiæ, eorumque Vicariis, et officialibus, Citationes generales, vel speciales cum Commissione inserta, Monitoria, et alia hujusmodi cum Inhibitione per quam exequutio Decretorum, Mandatorum et provisionum hujusmodi retardetur, suspendatur, aut impediatur, minime concedantur, et quatenus nunc, aut imposterum concessa fuerint, nullatenus inhibeant, atque ad Episcopis, aliisque Locorum Ordinariis impune sperni possint; quacumque consuetudine etiam immemorabili, vel quovis Privilegio, aut stylo concedendi Inhibitiones in Causis prædictis, tametsi temporarias, penitus exclusis. Nos enim Citationes, et Monitoria, aliter quam ut

præfertur, concessa, vel imposterum concedenda, nulla, atqæ irrita declaramus, et pro nullis, atque irritis haberi volumus, et mandamus: Decernentes, quod adversus Decreta, Mandata, et Provisiones ejusmodi, quas, vel quæ ab Episcopis, aliisque Locorum Ordinariis fieri, vel capi contigerit in Causis, et negotiis prædictis, vel simplex dumtaxat, et extrajudicialis Recursus per viam supplicis libelli, ad Nos, et Successores Nostros Romanos Pontifices, vel respective, et juxta Causarum naturam, et qualitatem, Appellatio ad quos de Jure, in solo devolutivo, et sine retardatione, vel præjudicio legitimæ exequutionis, recipi, et admitti possit.

§ 39. Quoniam vero in hisce ipsis negotiis, et Causis, in quibus Inhibitiones Canonicam exequutionem impedientes, aut suspendentes, concedi non debent, dari possunt casus, qui per ipsum Sacrum Concilium Tridentinum, vel juxta ejus Mentem, per Apostolicas Constitutiones, et Sacrarum Congregationum declarationes, aut communem Doctorum Sententiam, a præfata generali regula de non concedendis Inhibitionibus, eisque posthabendis, excipiuntur, quique ut plurimum non aliter, quam prudenti Judicis arbitrio secundum particulares Facti circumstantias æstimari possunt: Hinc Nos, ne sub ejusmodi prætextu, Inhibitiones, ut supra prohibitæ, vulgo et sine ullo delectu etiam in Casibus non exceptis concedantur: Statuimus et mandamus, quod in dictis Causis, et negotiis superius expressis, Metropolitani, Patriarchæ, Primates aliique Judices prædicti, et præsertim Cameræ nostræ generalis Auditor, ejusque Locumtenentes, et Signaturæ Justitiæ Præfectus, ejusque Auditor, ad quos in contingenti casu pro obtinenda Inhibitione Recursum haberi contigerit, etiamsi asseratur, casum illum a Sacro Concilio, vel Apostolicis Constitutionibus, quacumque de Causu exceptum esse: Nihilominus literas Citatorias, vel Monitorias cum Inhibitione hujusmodi non concedant, nisi prius ex facti circumstantiis, in supplici libello a Parte recurrente clare ac dilucide exponendis, et cum aliquo documento semiplene saltem verificandis, eisdem summarie apparuerit, casum illum esse de exceptis, et propterea Episcopo, vel Ordinario Loci inhibendum esse, ne ad ulteriora procedat; Tunc enim, et non alias, et postquam ipsi Judices, quorum consientiam hac in parte oneramus, super dicti supplici libello manu sua rescripserint, quod Inhibitio concedi potest, libellusque cum rescripto ejusmodi in Actis productus fuerit, diligenter ibidem custodiendus, et asservandus, licet eorum Notariis, sive Actuariis literas Citatorias cum dicta Inhibitione expedire et Patri recurrenti tradere, ita tamen, ut in earum calce expresse adjiciatur sequens clausula; "Nos enim, attentis Juribus, et supplici libello Nobis præsentatis atque in Actis exhibitis, sic, ut præfertur, inhibendum esse, speciali Rescripto mandavimus." Alias literæ ejusmodi sine tali clausula nullam vim inhibendi habeant in casibus prædictis.

§ 40. Et nihilominus si Notarii, sive dicto speciali Rescripto super supplici libello, aut sine productione illius in actis, aut sine prædicta clausula, Citationes ullas, aut Monitoria cum inhibitione, sub quocumque prætextu, seu colore, expedire ac tradere præsumpserint, etiamsi illæ, aut illa a Judice subscripta fuerint, pœnam infamiæ, et perpetuæ inhabilitatis, ad Officium Notarii in Causis Ecclesiasticis exercendum et quoad illos Cameræ Nostræ generalis Auditoris, aut aliorum Romanæ Curiæ Judicum superius expressorum, etiam quinquaginta ducatorum auri de Camera,

pro una medietate Cameræ Nostræ Apostolicæ, et pro alia ipsi Parti recurrenti, et in causa interesse habenti, sin minus alicui ex Locis Piis, arbitrio Nostro, Nostrorumque Successorum destinando, applicandam, ipso facto incurrant.

§ 41. Ad hæc, similiter inhærentes dispositioni ejusdem Sacri Concilii sess. 7. de Reform. cap. 14., et sess. 14. cap. 5., necnon etiam decreto Piæ mem. Benedicti XIII. hac in re promulgato inter ejus additiones ad Decreta Urbani Papæ VIII. in appendice ad Concilium Romanum, volumus, et mandamus, quod Clerici Saeculares, aut Regulares extra Monasterium degentes, quomodolibet exempti, in Civilibus Causis Mercedum, et miserabilium Personarum, etiamsi certum Judicem a Sede Apostolica deputatum in partibus habeant: In aliis vero, si ipsum Judicem non habuerint, coram Locorum Ordinariis, tamquam ab ipsa Sede delegatis, conveniri in prima instantia, et Jure medio ad solvendum debitum cogi possint.

§ 42. Quo vero ad Personas non exemptas, inhærendo similiter dispositioni ejusdem Sacri Concilii sess. 13. de Reform. cap. 1., et sess. 22. cap. 7., et sess. 24. cap. 20. necnon supradictis Decretis generalibus Congregationis Episcoporum editis anno MDC. cum novissimis additionibus, seu declarationibus Piæ mem. Benedicti XIII. in Appendice Concilii Romani; Volumus, statuimus, et mandamus, quod Causæ omnes, tam Civiles, quam Criminalis, ad Forum Ecclesiasticum pertinentes, exceptis Privilegiatis, quæ ex eodem Concilio, vel alias juxta Canonicas Sanctiones apud Nos, et Sedem Apostolicam tractari possunt, aut debent, coram Ordinariis Locorum dumtaxat, in prima Instantia cognoscantur, neque a Metropolitanis, Patriarchis, aut Primatibus, aliisque Judicibus Ecclesiasticis, etiam Nostris et Sedis Apostolicæ Nuntiis, vel de latere Legatis, aut Cameræ Nostræ generali Auditore, et cæteris quibuslibet Curiæ Nostræ Judicibus ad se avocari, vel aliis committi possint, nisi per viam legitimæ appellationis, et in casibus ut supra non prohibitis, ad ipsorum Tribunalia deferantur,

§ 43. Appellationes autem non recipiantur, neque inhibitiones vigore illarum concedantur, nisi prius constiterit, quod nedum per legitimam Personam, et intra legitima tempora vere appellatum fuerit; Sed etiam, quod appellatum fuerit a Sententia definitiva, vel habente vim definitivæ, aut a gravamine, quod per definitivam Sententiam reparari non possit: Idque per publica Documenta, quæ realiter in Actis exhibeantur; Tunc enim, et non antea, Judici, ad quem appellatum fuerit, in Causa se intromittere, citationes et inhibitiones concedere liceat; dummodo tamen concedantur cum inscriptione tenoris Sententiæ, aut Decreti definitivi, seu vim definitivæ habentis, vel damnum per definitivam irreparabile inferentis. Alias citationes, Processus, et inde sequuta quæcumque, sint ipso jure nulla, atque impune sperni possint.

§ 44. Quod si appellans asserat, Sententiæ, aut Decreti Exemplum authenticum culpa Judicis a quo, vel Notarii, sive Actuarii, habere non posse, tum saltem copiam simplicem Sententiæ, seu Decreti, in Actis producere teneatur, ejusque tenori, in literis Inhibitorialibus inserto adjicienda erit, prout adjici volumus, et mandamus, in earum corpore expressa conditio: "Quatenus tamen tenor insertus vere, et in substantialibus cum Originali concordet, eodemque Originali præsentes literæ sint in

tempore posteriores, alioquin nullæ, et irritæ censeantur:" Et si secus factum fuerit, inhibitiones aliter concessas nullatenus afficiant, et Notarii, sive Actuarii, qui illas expediverint, incidant in pœnas superius expressas.

§ 45. Cum vero a gravamine, quod per definitivam reparari nequit, appellatum fuerit, si quidem res sit de carceratione jam sequuta cum Mandato verbali, non aliter expediri poterunt Inhibitiones vigore Appellationis, quam constito prius de ipsa carceratione per depositionem saltem duorum Testium. Interim tamen Appellans in eodem, quo reperitur, carcere permanebit, donec aliter ser. ser. judicatum fuerit. Ubi vero agatur de censuris jam prolatis, vel de comminatione Carcerationis, Torturæ, aut Censurarum, observetur omnino dispositio dictorum Decretorum Congregationis Episcoporum sub rec. mem. Clemente VIII.,[1] juxta additiones, et declarationes piæ mem. Benedicti XIII.[2]

§ 46. Ulterius in prædictis Causis in prima Instantia pendentibus, vel aliis superius expressis, in quibus non admittitur appellatio in suspensivo, Citationes, quæ expediri solent coram Cardinali Signaturæ Justitiæ Præfecto, vel ad effectum comparendi, vel pro adeundo eamdem Signaturam, tametsi ab ejus Auditore subscriptas, vim inhibendi nullatenus sortiri posse volumus, easque ad prædictos alios dumtaxat effectus, comparendi scilicet, vel adeundi Signaturam, expeditas censeri, non autem ad retardandam executionem, vel suspendendum processum ad ulteriora.

§ 47. Denique quoad Causas privilegiatas, quæ, ut præfertur, in prima etiam Instantia apud Nos, et Sedem Apostolicam tractari possunt, nihil ex antiquo mutandum esse volumus, sed Monitoria in illis coram Cameræ Nostræ generali Auditore, vel ejus Locumtenentibus, prout hactenus laudabiliter observatum est, expedienda esse, juxta præscriptum Apostolicarum Constitutionum, et præsertim fel. mem. Pauli V. Prædecessoris Nostri in Constitutione, quæ incipit: Universi, necnon prædictarum additionum, et declarationum Benedicti XIII., exceptis tamen Monitoriis intimandis ultra Montes, in quibus ad evitanda scandala, et litigantium incommoda, volumus omnino renovari, et observari stylum, qui olim in eo Tribunali vigebat, id est, quod ad ejusmodi Monitoriorum expeditionem non aliter prōcedatur, quam oblato prius ipsi Auditori, vel alteri ex ejus Locumtenentibus, coram quo Monitorium expediendum erit, supplici Libello universam Facti speciem clare, et dilucide continente, et prævio etiam ejusdem Judicis rescripto, quod monitorium expediri possit, penes causæ notarium vel actuarium diligenter custodiendo. Etsi aliter, quam præfertur, et absque dicto supplici libello, ac speciali judicis rescripto dicta Monitoria ultra Montes intimanda expedita fuerint, Notarius, sive Actuarius, et Substitutus, qui illa expediverit, ipso facto incidat in pœnas superius expressas.

§ 48. Omnia, et singula hactenus a Nobis disposita ad rectam Judiciorum methodum restituendam, eo impensius ab omnibus exacte custodiri, et observari mandamus, quo clarius constat, hac nostra Constitutione non novas ferri, sed antiquas instaurari leges, provide, sapienterque institutas, et temporum injuria, ac hominum fraude obsoletas, et novo Pontificiæ auctoritatis præsidio communiri ordinem proce-

[1] See Appendix III. [2] See Appendix V.

dendi in Causis, jamdiu præscriptum Superioribus, et Inferioribus Tribunalibus a Sacra Tridentia Synodo Congregationum Decretis, et Prædecessorum Nostrorum Romanorum Pontificum Constitutionibus, aliisque Ordinationibus Apostolicis. Ideoque, si ipsi Judices, omni semoto, ut par est, humanæ cupiditatis affectu, præ oculis solum habuerint, quæ tam maturo, tamque saluberrimo sunt constituta et ordinata consilio, facile eorum quilibet agnoscet, quæ sui, et quæ alieni Ministerii partes esse debeant in admittendis, ac respective rejiciendis Causarum Appellationibus et Inhibitionibus: Atque ita fiet, ut non solum unicuique in suo ordine debita Jurisdictionis, et auctoritatis prærogativa servetur: Sed etiam ut, exstinctis prorsus, ac redicitus avulsis omnium contentionum, et discordiarum seminibus, mutuo charitatis vinculo Tribunalia socientur, et inter illa recte agendi disciplina Christiano Populo utilis, et necessaria restituatur.

§ 49. Demum ut, exemplo Nostro, omnes præmissorum executioni caute, et pro viribus incumbant, et ut præsertim Notariis, Tabellionibus, et eorum Actuariis, et Substitutis omnis contraveniendi ansa præcidatur, volumus, et expresse mandamus, Processus, et Acta Causarum in Nostra Romana Curia coram quovis Judice pendentium, ac Inhibitiones, Appellationes, Monitoria, aliasque Citatoriales, et Inhibitoriales literas, quas ab iisdem Notariis, eorumque Substitutis, scientibus, vel insciis Judicibus, vel alias quomodolibet in posterum expediri contigerit, sedulo recognosci, et examinari per fide dignas Personas a Nobis opportune deputandas, quæ si deprehenderint, easdem Inhibitiones contra hujus Constitutionis formam, et ad subterfugienda Ordinariorum, et Episcoporum judicia, quæsito gravaminis colore, fuisse perperam concessas, et expeditas, in eosdem Notarios, et Substitutos canonicis pœnis, aliisque a Nobis supra expressis, severe pro modo culpæ animadvertant.

§ 50. Decernentes has præsentes literas semper firmas, validas, et efficaces existere et fore; suosque plenarios, et integros effectus sortiri, et obtinere, ac ab illis, ad quos spectat, et pro tempore quandocumque spectabit, inviolabiter, et inconcusse observari: Sicque, et non aliter in præmissis per quoscumque Judices Ordinarios, et Delegatos, etiam Causarum Palatii Apostolici Auditores, ac Sanctæ Romæ Ecclesiæ præfatæ Cardinales, etiam de latere Legatos, et ejusdem Sedis Nuntios, aliosve quoslibet quacumque præeminentia, et potestate fungentes, et functuros, sublata eis, et eorum cuilibet quavis aliter judicandi, et interpretandi facultate, et auctoritate, judicari, et definiri debere, ac irritum, et inane, si secus super his a quoquam quavis auctoritate scienter, vel ignoranter contigerit attentari.

§ 51. Non obstantibus præmissis, ac quatenus opus sit, nostra, et Cancellariæ Apostolicæ regula de jure quæsito non tollendo, aliisque Constitutionibus, et Ordinationibus Apostolicis, necnon quibusvis, etiam juramento, confirmatione Apostolica, vel quavis firmitate alia roboratis, statutis, et consuetudinibus, ac usibus, et stylis, etiam immemorabilibus, privilegiis quoque, indultis, et Literis Apostolicis, præfatis aliisque quibuslibet Judicibus, Curiis, Tribunalibus, et Personis, etiam quantumvis sublimibus, et specialissima mentione dignis, sub quibuscumque tenoribus, et formis, ac cum quibusvis etiam degoratoriarum derogatoriis, aliisque efficacioribus, efficacissimis, et insolitis clausulis, irritantibusque Decretis, etiam motu, scientia, et potestatis

plenitudine paribus, ac consistorialiter, et alias quomodolibet in contrarium præmissorum concessis, editis, factis, ac pluries iteratis, et quantiscumque vicibus approbatis, confirmatis et innovatis: Quibus omnibus, et singulis, etiam si pro illorum sufficienti derogatione de illis, eorumque totis tenoribus specialis, specifica, expressa, et individua, ac de verbo ad verbum, non autem per clausulas generales idem importantes, mentio seu quævis alia expressio habenda, aut aliqua alia exquisita forma ad hoc servanda foret, tenores hujusmodi, ac si de verbo ad verbum nihil penitus omisso, et forma in illis tradita observata exprimerentur, et insererentur, præsentibus pro plene, et sufficietur expressis, et insertis habentes, illis alias in suo robore permansuris, ad præmissorum effectum hac vice dumtaxat specialiter, et expresse derogatum esse volumus, cæterisque contrariis quibuscumque.

§ 52. Ut autem eædem præsentes literæ ad omnium notitiam facilius deveniant, volumus illas, seu earum exempla ad valvas Ecclesiæ Lateranensis, et Basilicæ Principis Apostolorum, necnon Cancellariæ Apostolicæ, Curiæque Generalis in Monte Citatorio, ac in Acie Campi Floræ de Urbe, ut moris est, affigi, et publicari, sicque publicatas, et affixas omnes, et singulos, quos illæ concernunt, perinde arctare, ac afficere, ac si unicuique eorum nominatim, et personaliter intimatæ fuissent: ipsarum autem literarum transumptis, seu exemplis etiam impressis, manu tamen alicuius Notarii publici subscriptis, et sigillo personæ in Ecclesiastica dignitate constitutæ munitis, eamdem prorsus fidem, tam in judicio, quam extra illud ubique locorum haberi, quæ haberetur ipsis præsentibus, si forent exhibitæ, vel ostensæ.

§ 53. Nulli ergo omnino hominum liceat hanc paginam Nostri decreti, constitutionis, declarationis, annullationis, admonitionis, et voluntatis infringere, vel ei ausu temerario contraire; si quis autem hoc atientare præsumpserit, indignationem Omnipotentis Dei, ac Beatorum Petri, et Pauli Apostolorum ejus se noverit incursurum. Datum Romæ apud Sanctam Mariam Majorem anno Incarnationis Dominicæ milesimo septingentesimo quadragesimo secundo, tertio Kal. Aprilis, Pontificatus Nostri Anno II. P. Card. Pro-Datarius. D. Card. Passioneus. Visa de Curia. N. Antonellus. J. B. Eugenius. Registrata in Secretaria Brevium. Publicat. die 18. Aprilis ejusdem Anni.

III.

Decreta S. Congregationis Episcoporum, de mandato Clementis Papæ VIII. lata Anno 1600. *Circa Appellationes et Inhibitiones.*

Ad tollendas ambiguitates et controversias jurisdictionales, quæ inter appellationem et prioris instantiæ Judices non sine Partium dispendio cursusque justitiæ impedimento et sæpe cum scandalo oriuntur, Sacra Congregatio Causis Episcoporum præposita, facta prius relatione SS. D N. Clementi Papæ VIII., ac de Sanctitatis Suæ mandato, vivæ vocis oraculo desuper habito, in hunc, qui sequitur modum ab omnibus, ad quos spectat, in posterum fieri ac servari debere mandavit et mandat.

I. Metropolitani, Archiepiscopi, Primates aut Patriarchæ in Suffraganeos eorumve Subditos non judicent nisi in casibus a jure expressis.

II. Item nec alii Superiores, etiam Nuntii vel Legati de latere, specificam facultatem maiorem non habentes, causas in Curiis Ordinariorum, vel aliorum inferiorum. Judicium pendentes ad se advocent, nisi per viam legitimæ appellationis ad ipsorum Tribunalia deferantur; tuncque Appellantes ab inferiorum jurisdictionibus quoad alias Causas eximere non possint.

III. Appellationes nunquam recipiantur, nisi per publica documenta, quæ realiter exhibeantur, prius constiterit, appellationem a sententia definitiva vel habente vim definitivæ aut a gravamine, quod per definitivam sententiam reparari non possit, in casibus a jure non prohibitis per legitimam personam et intra debita tempora fuisse interpositam ac prosequutam.

IV. Nec, dum causa coram inferioribus Judicibus pendet, ante definitivam sententiam vel vim definitivæ habentem de gravamine illato Superiores cognoscere valeant, licet citra præjudicium cursus Causarum se id facere contestentur; nec ad hunc effectum liceat eis inhibere aut simpliciter mandare, ut ipsis copia processus transmittatur, etiam expensis Appellantis.

V. Inhibitiones post appellationem, sicut præmittitur, receptam non concedantur, nisi cum inscriptione tenoris sententiæ aut decreti definitivi, aut vim definitivæ habentis vel damnum per definitivam irreparabile continentis; alias inhibitiones et processus et inde sequuta quæcunque, sint ipso jure nulla, eisque impune non parere liceat.

VI. Si Appellans asserat, sententiæ aut appellationis exemplum culpa Judicis a quo vel Actuarii habere non posse, non ideo recipienda erit appellatio aut aliqua inhibitio concedenda; sed eis tantum, ad quos pertinet, injungi poterit, ut, soluta condigna mercede Actorum, exemplum authenticum Appellanti intra brevem aliquem competentem terminum tradatur. Caveat tamen Judex a quo, ne, si vere appellatum fuerit in casu appellabili, interim aliquid in præjudiciam Appellantis attentet; et si per actum publicum aut per testium depositionem constiterit, Acta denegari Appellanti, tunc mandato tradendi Acta possit Judex appellationis adjicere, ne interim aliquid novi contra Appellantem attentetur.

VII. Ab exequutione Decretorum Sac. Concilii Tridentini aut Visitationis Apostolicæ appellationes a Metropolitanis non recipiantur, nec si Epjscopi virtute ejusdem Sacri Concilii procedunt, uti Sedis Apostolicæ Delegati in Cauis, quæ sub eorum jurisdictione Ordinaria non comprehenduntur; salva tamen in hoc casu Legatorum et Nuntiorum Apostolicorum auctoritate.

VIII. In Causis vero Visitationis Ordinariorum aut correctionis morum quoad effectum devolutivum tantum admittantur, nisi de gravamine per definitivam irreparabili agatur; vel cum Visitator, citata Parte, et adhibita Causæ cognitione, judicialiter procedit: tunc enim appellationi locus erit, etiam quoad effectum suspensionem.

IX. Cum a gravamine, quod per definitivam reparari nequit, ut indebitæ carcerationis vel torturæ aut excommunicationis, etiam comminatæ, appellatur: nonnisi visis Actis, ex quibus evidenter appareat de gravamine appellatio admittatur, aut inhibitio vel provisio aliqua concedatur.

X. Causa appellationis pendente, appellans in eodem, quo reperitur carcere, permanebit, quoad Judex, ad quem appellatum est, visis actis, et Causa cognita, aliter decreverit: et tunc si a Judicis ad quem decreto, vim definitivæ habente, fuerit appellatum, nihil mandare aut pro sui decreti exequutione attentare poterit, donec per Judicem Superiorem aliud fuerit ordinatum.

XI. Acta originalia processus primæ instantiæ ad Judicem appellationis Notarius mittere non cogatur, nisi probabilis aliqua falsitatis causa et suspicio incidat, quæ judicialiter objiciatur; et tunc, terminata causa, remittenda sunt ad Ordinarium, ut in suo Archivo conserventur.

XII. Censura Ecclesiastica in Appellantem prolata relaxari aut nulla declarari per Judicem Appellationis non possit, nisi auditis Partibus, et Causa cognita; tuncque, si constiterit, eam justam esse, ad Judicem, qui excommunicavit, Appellans remittendus est, ut ab ipso juxta Sacros Canones beneficium absolutionis, si humiliter petierit debitamque emendationem præstiterit, obtineat: si vero injustam esse claro apparet, superior absolutionem impendat; si dubitetur, honestius est, ut ad excommunicatorem intra brevem aliquem competentem terminum eidem præfigendum absolvendus remittatur, licet etiam superior hoc casu idipsum per se præstare jure possit.

XIII. Absolutio ad cautelam, nonnisi parte citata, et visis Actis, cum dubitatur de nullitate excommunicationis ab homine prolatæ, vel a jure, si occurrat dubium facti vel probabile dubium juris, concedenda erit, tuncque ad tempus breve cum reincidentia et præstita per excommunicatum cautione de stando juri et parendo mandatis Ecclesiæ tantum: et si juxta formam a jure præscriptam apparebit, [ali] quem ob manifestam offensam excommunicatum fuisse, debitam etiam satisfactionem præstare, et si ob contumaciam manifestam, expensis pariter satisfacere et cavere de judicio, sisti coram excommunicatore is tenebitur, priusquam ad cautelam absolvatur.

XIV. A sententia etiam definitiva, contra verum contumacem prolata, appellatio non recipiatur, nec inhibitio aut alia quævis provisio, quamdiu Appellans in hujusmodi vera contumacia perstiterit, concedatur. Romæ in Sacra Congregatione die 16 Octobris 1600.

IV.

Decreta Urbani Papæ VIII. Anni 1626. *Circa eamdem materiam appellationum et inhibitionum.*

Declaratio Sacræ Congregationis Cardinalium et Prælatorum, a sanct. mem. Urbano XIII. alias deputatæ et a Sanctissimo D. N. Innocentio X. renovatæ, super appellationibus et inhibitionibus Tribunalis Auditoris Cameræ et aliorum Tribunalium Curiæ Romanæ in præjudicium Nuntiorum, Episcoporum ac Superiorum Regularium, tenoris infrascripti, videlicet: Dubitatum fuit:

Primo, an in Tribunali Auditoris Cameræ Romanæ possint concedi monitiones seu Monitoria cum absolutione, etiam cum reincidentia vel ad cautelam, excommunicatis

per Episcopos et alios Ordinarios ex causa violatæ jurisdictionis, immunitatis vel libertatis Ecclesiasticæ Appellantibus vel alias recurrentibus ad supradicta Tribunalia.

Secundo, an in Causis, quæ agitantur in supradictis Tribunalibus Curiæ Romanæ, possit recursus haberi ad Sacram Congregationum super Immunitate et controversiis jurisdictionalibus pro resolutione vel declaratione, an sit vel non sit commissa violatio jurisdictionis, immunitatis vel libertatis Ecclesiasticæ, et an sit locus reintegrationi hujusmodi violationis, et interim debeant dicta Tribunalia supersedere usque ad resolutionem seu declarationem ejusdem Sac. Congregationis illamque seque et exequi.

Die 4. et 11. Augusti 1626., Dubiis supradictis cum interventu omnium Illustrissimorum DD. Cardinalium et Reverendissimorum Prælatorum deputatorum mature discussis, ac rationibus hinc inde deductis diligenter ponderatis, unanimi consensu censuit:

Quoad Primum, Tribunal Auditoris Cameræ necnon alia Tribunalia supradicta non posse hujusmodi absolutiones concedere, etiam cum reincidentia vel ad cautelam.

Quo vero ad Secundum, ut supra, recurri posse, et interim supradicta Tribunalia exspectare debere resolutionem seu declarationem et illam omnino sequi et exequi.

Quibus quidem decretis eidem Sanctissimo die 5 Septembris ejusdem anni 1626. plene relatis una cum rationibus et auctoritatibus, Sua Sanctitas ea approbavit et confirmavit illaque omnia exequi jussit; et ad hunc effectum notificata fuerint. Et subinde, cum de supradictis dubiis iterum actum esset in Congregatione habita die 27. Aprilis 1650., nemine dissentiente, resolutum fuit. Auditorum Cameræ debere decreta ut supra edita omnino observare ac præcipere, ut a suis Ministris et Officialibus exacte observentur.

V.

Additiones seu declarationes Sanctissimi Domini Nostri Benedicti Papæ XIII. super quibusdam ex allatis Decretis, quas Sanctitas Sua de consilio et Voto Congregationis particularis, ab ipsamet deputatæ super reformatione Tribunalium et Congregationum, servandas in posterum districte mandat et præcipit.

Ad II. Decretum Clementis VIII.

1. Recipi possint, et dumtaxat in Tribunali Auditoris Cameræ, constituta Reorum in causis primæ instantiæ, in quibus de pœnis corporalibus agitur, habita ratione ad titulum inquisitionis, non vero in causis censurarum vel simplicis mulctæ vel declarationis Irregularitatis sive in aliis causis, in quibus dicta pœna corporalis non intrat.

2. Regularium constituta nunquam recipiantur.

3. Hujusmodi constituta fieri tantum possint coram A. C. in criminalibus, non vero coram alio Judice appellationis, neque in Urbe neque extra eam, nec etiam in Sacra Congregatione negotiis Episcoporum et Regularium præposita.

4. Constitutus Reus coram A. C. debeat statim in Carceribus formalibus Urbis

detineri, deinde primum expediantur in ejus Tribunali literæ inhibitoriales et compulsoriales (absque eo, quod constitutus juret, se suspectum habere Ordinarium) pro transmissione Actorem coram dicto Ordinario; nec possit Reus habilitari per Urbem et extra Carceres formales, nisi visis et discussis Actis, et quatenus de jure sit locus dictæ habilitationi, audita parte offensa vel ejus Procuratore, si in Curia sit præsens necnon Fisco R. C. A., et quatenus causa sit cum Procuratore Fiscali Curiæ Ecclesiasticæ, audito Promotore Fiscali Curiarum Episcopalium in Urbe, atque insuper facto desuper verbo in plena Congregatione Criminali A. C.

5. Si Acta vel non incœpta coram Ordinario vel sufficienter impinguata non fuerint, non communicenter Reo, sed eo retento in Carceribus formalibus, committatur Ordinario processus informativi compilatio vel respective impinguatio, facienda expensis Partis querelantis vel Fisci Ecclesiastici, si ea non adsit.

6. Actis sufficientur impinguatis, servatis servandis, procedatur ad expeditionem Causæ, prout de Jure, audita semper Parte offensa vel ejus Procuratore, necnon Fisco R. C. A. et Curiarum Episcopalium, ut supra in quolibet actu; districte injungente Sanctitate Sua, ut coram semetipso A. C. tractari et expediri faciat hujusmodi causas juxta meritum justitiæ, ne Rei inquisiti forum Ordinarii declinantes in prima instantia, in Urbe quærant reatuum præsidium

Ad V. et VI. Decretum.

Cum experientia docuerit, non raro Appellantibus ad Tribunal A. C. Ordinarios denegare copias publicas Sententiarum vel Decretorum et aliquando continuare actus præjudiciales contra Appellantes in odium etiam appellationis interpositæ; quapropter, si forma decreti VI. indistincte servanda esset, tempore, quo requisitoriæ Judices appellationis expediuntur et ad manus Judicis, a quo appellatum fuit, perveniant, præsertim si magna sit locorum distantia, præjudicia contra appellantes cumularentur: ideo Sanctissimus Dominus Noster declarat et denuõ statuit, et mandat, in aliquibus casibus et circumstantiis, in quibus arbitrio et prudentia A. C. et Locumtenentium, ad quos appellatio fuit interposita, necesse est opportune et solicite provideri, ut prævia in Actis productione copiæ simplicis sententiæ seu decreti possint expediri inhibitiones vigore appellationis cum insertione ejusdem simplicis copiæ: ita tamen, ut in corpore ejusdem inhibitionis exprimatur, quod, si sententia sive decretum insertum non fuerit latum ante expeditionem literarum inhibitorialium, vel copia non fuerit conformis originali, sententiæ sive decreto promulgato, tunc inhibitio nullatenus vim habeat et afficiat, sicuti præsentis decreti tenore nulla et irrita declaratur, ut impune sperni possit ac valeat.

Caveant autem Notarii, ne inhibitiones vigore appellationis concedant, nisi cum copia publica ad formam dictorum Decretorum sub Clemente VIII. et in casibus particularibus cum copia simplici, modo tamen supra expresso, facto de his verbo cum Judice, sub pœna suspensionis ab officio aliisque corporalibus arbitrio Sanctitatis Suæ.

Ad IX. Decretum.

Sanctitas Sua declarat et mandat, in causa prætensæ indebitæ carcerationis, quatenus sit sequuta cum mandato Judicis verbali, ut possint expediri inhibitiones vigore appellationis, constito tantum de carceratione per publicum documentum Notarii vel Carcerarii sive etiam cum depositione duorum Testium. In causis vero comminatæ injustæ carcerationis, torturæ vel excommunicationis, Sanctitas Sua declarat et mandat, ut non expediantur inhibitiones generales et indefinitæ, sed tantum compulsoriales pro transmissione copiæ Actorum ad effectum cognoscendi, an sit deferendum necne appellationi, adjuncta in dictis literis compulsorialibus inhibitione, ut interim Judex a quo ad ulteriora non procedat: et quatenus, visis Actis, resultet evidens gravamen, tunc admittatur appellatio cum inhibitione, et Causa cognoscatur coram Judice ad quem; si vero de hujusmodi gravamine non constet, remittatur Causa ad Judicem a quo, cognoscenda in prima instantia.

Ad I. et II. Decretum Urbani VIII.

Statuit præterea Sanctitas Sua, quod in Causis violatæ Jurisdictionis, Immunitatis et libertatis Ecclesiasticæ A. C. vel alia quælibet Tribunalia Urbis et extra eam nequeant appellationes admitere, inhibitiones relaxare aut absolutionem a censuris, etiam cum reincidentia vel ad cautelam, concedere, sed recursus et appellationes fieri tantum possint ad Sac. Congregationem Immunitatis. Quodsi in aliqua Causa dubitari contingat, an agatur de causu violatæ Immunitatis, seu Jurisdictionis aut libertatis Ecclesiasticæ, supersederi debeat in Causa coram quolibet Judice, donec fuerit resolutum in eadem Sacra Congregatione, an fuerit violata Immunitas, Jurisdictio vel libertas Ecclesiastica, et an sit locus reintegrati ni juxta declarationem allatam in supra recensitis Decretis Urbani VIII.

Insuper cum A. C. ex facultatibus sibi concessis sit exequutor omnium literarum Apostolicarum, vel solus, cum alii non sunt deputati, executores, vel quando sunt deputati cumulative cum ipsis, atque etiam sit exequutor omnium sententiarum tam in Curia quam extra per quosvis Judices prolatarum, ac tandem concedere soleat monitoria super exequutione resolutionum Sacrarum Congregationum: Sanctitas Sua decrevit, quod monitoria in Tribunali A. C. super exequutione literarum Apostolicarum non expediantur, nisi exhibito legitimo documento earumdem literarum Apostolicarum. Quoad vero sententias monitoria non concedantur, nisi prævio documento publico Actuarii Causæ cum legalitate Ordinarii, et quoad decreta Sac. Congregationum exhibeantur copiæ subscriptæ a Secretario cum Sigillo Cardinalis Præfecti: nec possint hujusmodi monitoria super exequutione sententiarum vel decretorum aliter expediri, etiam si sententiæ et decreta publice typis evulgata fuerint vel in libris impressa referantur; et in dictis monitoriis apponatur clausula: dummodo non vigeat eis ad huc pendans coram Judice competenti super sententia vel Constitutionibus Apostolicis aut decretis Sacrarum Congregationum, de quibus agitur.

Quia vero inoluit abusus, quod citationibus typis impressis in Urbe cum subscriptione alicujus ex Notariis A. C. quæ dicuntur Camerales, quæque introductæ sunt ad

hoc, ut Partes absentes a Curia citentur, ut compareant coram A. C. seu ejus Locumtenente in judiciis exquutivis seu obligationibus Cameralibus, in ejus Tribunali promovendis, utantur Curiales et Partes in aliquibus Causis appellationum ab Ordinariis, et etiam audeant iis uti in Causis coram Sacris Congregationibus, adeo ut per intimationem in Partibus hujusmodi citationum cum appositione inhibitionis deterreantur Judices a quibus procedere, et Partes Judicia continuare coram dictis primis Judicibus et Ordinariis desinant, ob reverentiam Tribunalis A. C. et fortius Sacrarum Congregationum et ob timorem incursus attentatorum : ideo Sanctitas Sua mandavit, quod per intimationem dictarum citationum, etsi in iis apponatur clausula inhibitoria, non intelligatur ulla inhibitio facta aut interposita, ita ut sperni impune valeat ac debeat in quibuscumque Causis in Sacris Congregationibus et coram A. C., sed quoad istius Curiam dictæ citationes suam vim, prout de jure, habeant, quatenus Causæ ex equutivæ seu obligationes Camerales fuerint, quæ in prima instantia coram eo agitari possint, ita quod dictæ citationes in aliis Causis nullo modo afficiant neque ad comparendum arctent.

Itidem Sanctissimus Dominus Noster in causis exemptorum et mercedum et miserabilium personarum servari omnino et districte mandat dispositionem Sac. Concilii Tridentini cap. 14. sess. 7. de reform., privilegiis, exemptionibus et consuetudinibus quibuscumque, etiam post Tridentinum a Sede Apostolica concessis et respective introductis, non obstantibus ; quæ Conciliaris dispositio est sequens "In Civilibus Causis mercedum et miserabilium personarum Clerici sæculares aut Regulares extra Monasterium degentes, quomodolibet exempti, etiamsi certum Judicem a Sede Apostolica deputatum in partibus habeant, in aliis vero, si ipsum Judicem non habuerint, coram locorum Ordinariis, tamquam in hoc ab ipsa Sede delegatis, conveniri et, prout de jure, ad solvendum debitum cogi et compelli possint. privilegiis, exemptionibus, Conservatorum deputationibus et eorum inhibitionibus adversus præmissa nequaquam valituris."

Ad XII. et XIII. Decretum Clementis VIII.

Quoad absolutionem ultimatam a censuris, servetur dispositio supradicti decreti XII. Clementis VIII., juxta etiam canonicam sanctionem: quod in causu [quo] constet de justitia censurarum, debeat remitti absolutio danda ad Judicem a quo; si vero constet clare de injustitia, Judex ad quem absolutionem impendat; si vero adsit dubietas, an fuerit justa vel injusta, honestius esset, ut ad excommunicatorem infra aliquem competentem terminum præfigendum absolvendus remittatur, licet etiam Judex ad quem hoc casu idipsum per se præstare jure possit. Verum quoad absolutiones reincidentia, quae Partibus concedi solent a Judicibus, ad quos appellatur, ad affectum audiendi, cum inoluerit usus tam in Tribunali A. C. quam forsan etiam in Metropolitanis aliisque Tribunalibus appellationum, quod committantur absolutiones cuicumque Confessario, ita ut Rei absque ulla reverentia proprii ordinarii pro absolutis se publice habeant: Sanctitas Sua statuit, ut in futurum hujusmodi absolutiones cum reincidentia, tam in Tribunali A. C. quam in Curiis Metropolitanis aliorumque Judicum appellationum, committantur ipsis Ordinariis excommunicantibus cum

clausula, ut infra tres dies absolvant censuratos juxta commissionem; quibus elapsis, si requisitus Ordinarius absolvere recusaverit vel neglexerit, absolvantur a Confessario juxta commissionis formam, quæ in præsenti servatur in dictis commissionibus absolutionum. Quoad vero censuratos in Urbe commorantes, committi debeat absolutio Cardinali Urbis Vicario seu ejus Vicesgerenti, ac præfata servari etiam mandavit in absolutionibus, quæ conceduntur per Congregationes, prout jam religiose in ipsis servatum fuit. Declaravitque rursus Sanctitas Sua, quod hujusmodi commissiones de absolvendo præsentari debeant Cancellario Ordinariorum, a qua præsentatione currere debeant tres dies, post quorum lapsum, et non data absolutione, possint ab aliis absolvi, ut supra, in commissione.

Quoad insuper censuratos mandat Sanctitas Sua, quod, reportata absolutione a censuris cum reincidentia, cedulones, quatenus affixi fuerint, amoveri non debeant, sed tantummodo tegantur et tecti remaneant, durante termino obtentæ absolutionis.

Cum in hujusmodi decretis agatur de appellationibus in Causis judicialibus, Sanctitas Sua enixe hortatur omnes Ordinarios, ut, cum ipsi Patrum nomen erga subditos promereantur potius quam Judicum, caveant, ne lites excitent, sed excitatas componere curent, præsertim inter pauperes et miserabiles personas, quas protegere præcipuum munus eorum est. Ideoque Sanctitas Sua mandat, quod pauperibus condonentur sportulæ et emolumenta quæcumque. etiam Cancellarii, et aliæ quæcumque expeditiones gratis dentur, etiam copiæ Actorum transmittendorum ad Judices ad quos: et quoad qualitatem paupertatis, hæc summarie cognoscatur per testes, gratis etiam examinandos, et de ea stetur arbitrio ipsius Ordinarii et Judicis, serio onerando conscientiam Ordinariorum et Judicum in re tam gravi, de qua specialiter Deo ipsi rationem erunt reddituri, ultra condignas pœnas contra inobservantes, relaxandas arbitrio Sanctitatis suæ; quodque decretum servari debeat in quacumque Curia Ordinariorum, Metropolitanorum et quorumcumque Judicum appellationum, etiam Nuntiorum Apostolicorum, et in quacumque Causa tam civili quam criminali.

Similiter, ut satis provideatur pauperibus legitantibus, prout summopere Ecclesiasticos Judices decet, Sanctitas Sua mandat, in quibuscumque supradictis Curiis deputari Procuratorem Pauperum et Advocatum, qui iis assistant in quibuscumque Causis Civilibus et Criminalibus, viros pietate et doctrina præstantes, cum assignatione alicujus mercedis, si posibile foret, et de iis electis habeatur ratio in provisionibus beneficiorum et in attestationibus faciendis Datariæ Apostolicæ, ut per Romanos Pontifices in provisionibus haberi valeat respectus ad servitia præstita in tam pio opere.

Itidem Sanctitas Sua quoad Tribunal A. C. mandavit, inviolabiliter servari reformationem Pauli Papæ V. in Constitutione incipiente: Universi agri § 20., videlicet, ut pauperibus dentur gratis extractus, registra, instrumenta, etiam publica, copiæ et aliæ quæcumque expeditiones et scripturæ, tam Civiles quam Criminales, et ostendantur etiam originalia Pauperum Advocato et Procuratori similiter gratis et absque ulla impensa: et si quando contigerit, probandum esse paupertatem, testes similiter gatis et summarie examinentur, et de paupertate stetur arbitrio Judicis; addito per Sanctitatem Suam, quod in casu gravaminis Judicis, quoad paupertatem non admis-

sam, recurri valeat ad Auditorem pro tempore Summi Pontificis, qui debita charitate servari faciat, quod æquum erit; prædictaque omnia mandat Sanctissimus servari in quibuscumque Curiis Urbis inviolabiliter.

Quia in Causis infra summam scutorum quinquaginta monetæ Romanæ, in quibus a Judicibus de partibus appellatur ad Urbem, juxta stylum et Apostolicas Ordinationes non debet in Curia procedi in gradu appellationis, sed per viam recursus deputantur Judices in partibus; cum ex penuria temporum videatur gravans appellantibus in Causis etiam ultra dictam summam scutorum 50 Causas prosequi appellationum in Curia: ideo Sanctitas Sua extendit dictam summam scutorum quinquaginta monetæ usque ad centum ejusdem monetæ Romanæ, ita ut, si summa causæ non sit ultra quantitatem scutorum centum, ut supra, Causa non dicatur curialis et appellabilis per viam appellationis, sed tantum deputandos esse Judices in partibus, qui procedant per viam recursus, quorum deputatio fieri debeat per Tribunalia Urbis, ad quæ pertinet.

Mandat rursus Sanctitas Sua, ut in Causis mercedum miserabilium personarum recursus et appellationes respective non admittantur a quocumque Judice appellationum, nisi in devolutivo pro rata scutorum quinquaginta monetæ Romanæ, et ultra dictam summam admitti debeant in suspensivo vel devolutivo, prout juris est, firmis tamen remanentibus Apostolicis ordinationibus, stylis et privilegiis, quæ forsan existerent in Tribunalibus Urbis et districtus ejusdem, in quibus nihil innovari intendit.

Demum ad conservandam debitam reverentiam Pontificali dignitati Alexander Papa IV. Decretalem edidit, relatam in cap. Quia Pontificali de Offic. et Potest. Judic. deleg. in 6.; ibi: "Quia Pontificali dignitate præditis ob reverentiam sacri officii plurimum deferri convenit, et eos plus aliis honorari decet, ut, cum a Judicibus vel Conservatoribus, a Sede Apostolica deputatis, contra eos ad coactiones aliquas sive pœnas fuerit procedendum, gradus et modestia in hujusmodi processu servetur, ita quod (eis quadam condigna reverentia supportatis) ingressus primo ipsius Ecclesiæ vel sacerdotale interdicatur ministerium, ac deinde ab officio suspendantur, et subsequenter aggravetur censura Ecclesiastica contra eos, nisi forte aliter fieri suaserit nimia contumacia, protervitas sive culpa." Hanc itaque Decretalem Sanctitas Sua inviolabiter servari mandavit in quibuscumque Curiis Judicum appellationum tam C. A. quam Metropolitanorum et etiam Nuntiorum Apostolicorum et aliorum quorumcumque.

F. A Archiepisc. Episc. Abellinen. et Frequentius Sacri Concilii Secretarius.

VI.

Chirographus Domini Nostri Benedicti Papæ XIII., vi cujus decernitur Promotor Fiscalis Generalis, qui pro Curiis Ecclesiasticis patrocinium causarum criminalium suscipiat, assignato in singulos menses salario viginti quinque scutorum, a Camera Apostolica persolvendorum.

12 *Julii* 1724.

Postquam mature perpendimus atque etiam propria, dum adhuc in Minoribus constituti eramus, experientia cognovimus, quam intolerabilis cum Ecclesiasticis tum Regularibus Prælatis oneris existeret necessitas sustinendi et prosequendi in hac Curia Romana lites et Controversias, quæ a Reis inquisitis per viam recursus aut appellationis ab illorum Decretis et sententiis isthinc introducuntur: ita quidem, ut plerique illorum ad evitanda hæc suis Diœcesibus et pauperibus Diœcesanis ac Religionibus respective damnosa dispendia Causas in secundis et ulterioribus instantiis indefensas derelinquant, ex quo dein sequitur, quod, cum a dictis Curiis necessariæ informationes Judicibus non suppeditentur, sæpius delinquentibus succedat absolutorias extorquere sententias in publicum justitiæ detrimentum necnon scandalum illorum, qui, in Diœcesibus et Religionibus de veritate criminis bene informati, delicta impune transire mirantur, quæ malis perseverantiæ in malo bonis autem subversionis causa existit: quam ob rem his tam perniciosis in bonorum morum et disciplinæ Ecclesiasticæ eversionem, quibus tamen conservandis omnes Superiores omne studium et vigilantiam suam impendere deberent, vergentibus exemplis opportunum poni obicem semper et summopere desiderabamus.

Postquam igitur Divinæ placuit Providentiæ Nos, nullo licet meritorum Nostrorum suffragio, ad supremum Apostolatus apicem elevare, partem Pastoralis solicitudinis Nostræ in illa consistere vigilantia reputantes, ut delinquentium supplicio cæteri emendentur, et vitia, bonorum contages, eradicentur: post maturam deliberationem determinavimus prædictis perniciosis exemplis debitum afferre remedium, liberando Prælatos et Superiores tam Ecclesiasticos quam Regulares a dispendioso onere prosequendi in hac Curia actiones Fiscales in suorum Judicatorum defensionem et providendo iisdem Ministrum capacitate, integritate et experientia præditum, qui tamquam *Promotor Fiscalis Generalis* supra dictarum Curiarum rationes in Judicio deducere simulque id omne præstare debeat, quod ad bonam et Canonicam defensionem necessarium et opportunum videbitur.

Itaque ad effectum hujus Nostræ determinationis ex motu Nostro proprio certe scientia et plenitudine potestatis Nostræ *absolute creamus, instituimus et stabilimus in perpetuum officium Promotoris Fiscalis Generalis pro præfatis Curiis Ecclesiasticis*, quod dehinc administrabit deputanda a Nobis et Successoribus Nostris persona, supradictis ornata qualitatibus, quas tota attentione impendere teneatur nomine et vice prætectarum Curiarum in patrocinium Causarum Criminalium, per viam appellationis aut recursus ad Tribunalia aut alias Congregationes competentes hujus Civitatis Nostræ Romæ devolutarum et ibi adhuc pendentium aut imposterum devolven-

darum. Proinde ut dictus Promotor Fiscalis Generalis omnimoda cum applicatione huic suo muneri vacare possit et debeat, destinamus et assignamus illi pro emolumento et salaria menstruo viginti quinque scuta singulis mensibus a Nostra Camera Apostolica persolvenda ex mandato Thesaurarii Nostri Generalis; quo salario ipsum contentum esse nec a Prælatis Sæcularibus aut Regularibus aliam quamcumque remunerationem, etiam titulo aut prætextu honorariorum, pro functionibus et laboribus suis prætendere posse volumus. solis literarum hinc inde mittendarum expensis exceptis: quodsi secus fecerit, gravibus atque etiam gravissimis pœnis ad Nostram Nostrorumque Successorum arbitrium obnoxius erit.

Porro, cum intentio Nostra eo collimet, ut ad efficacius et validius dictarum causarum patrocinium Promotor Fiscalis Generalis omnibus illis, quibus Procurator Generalis Fisci et Cameræ Nostræ Apostolicæ fruitur, subsidiis necessariis et opportunis adjuvetur: volumus et ordinamus, quod intervenire et assistere debeat Congregationi Criminali Auditoris Generalis ejusdem Nostræ Cameræ, in cujus Tribunali similes causæ specialiter agitari et judicari solent. Similiter volumus, dicto Promotori Fiscali Processus et omnia acta gratis communicari, sicut etiam citationes gratis expediri, expensas quoque pro describendis exemplis aut scripturis typo edendis necessarias ab Apostolica Camera Nostra suppeditari, eo prorsus modo, quo hæc omnia ex parte Fisci a Procuratore Fiscali Generali fieri et observari solent. Ut denique sæpe dictus Promotor Fiscalis in qualicumque actu et negotio audiatur, volumus, ipsum in omnibus et singulis hujusmodi causis in judicium citandum, citationesque ab ipso subscribendas esse eo modo et forma, quibus a Procuratore fiscali subscribuntur, ea prorsus lege ut, si dictus Promotor non fuerit citatus, neque ulla citatio subscripta, actus ex citationis defectu nullitatis vitio subjaceat.

Declaramus autem, quod præsens Noster Motus proprius quoad omnes et singulas dispositiones locum habere debeat in illis tantum causis, in quibus fient instantiæ *nomine solorum Promotorum Fiscalium ex præscripto officii sui*, nullo modo autem, quando adhærentes Fisco in judicio stare et pro defendendis Juribus propriis allegare et scribere vellent; in talibus enim causibus dictus Promotor Fiscalis Generalis nullam navare operam, neque Camera Nostra Apostolica ullos facere sumptus, aut alius quicumque qualecumque ones aut incommodum subire tenebitur.

Postremo volumus et decernimus, Congregationem Episcoporum et Regularium necnon Auditorum Generalem Nostræ Cameræ Apostolicæ plenæ omnium a Nobis in hoc Motu proprio dispositarum et ordinatarum rerum observantiæ invigilare, ac insuper hunc Motum proprium (qui a supradicto Auditore Cameræ in Codices actorum referendus et a Notario Congregationis Episcoporum et Regularium in suis libris signandus est) plenum omni tempore effectum, vigorem et executionem sortiri debere, nunquam vero obreptionis vitio aut intentionis Nostræ vel alio quopiam specialem, individuam et expressam mentionem requirente defectu notari et impugnari, neque in contrarium interpretari aut judicari posse, declarantes irritum et inane, si secus a quolibet scienter vel ignoranter attentasi contigerit: non obstantibus, quatenus ratione omnium et singulorum præmissorum opus sit, quod in præmissis interesse habentes seu habere prætendentes ad ea non fuerint vocati nec auditi, ne-

que Regula Nostræ Cancellariæ de Jure quæsito non tollendo, aliisque facultatibus et privilegiis præfatis quibuscumque concessis, Bulla reformationis Pauli V. et omnibus quibuscumque aliis Constitutionibus et Ordinationibus Apostolicis Nostrorum Prædecessorum, Legibus Civilibus et Canonicis, Statutis, Reformationibus, Usibus, Stylis, Consuetudinibus cæterisque contrariis quibuscumque, quibus omnibus et singulis, illorum tenores præsentibus pro plene expressis et de verbo ad verbum insertis habentes, ad præmissorum effectum hac vice duntaxat specialiter derogamus, quoniam talis est Nostra certa, expressa et determinata mens atque voluntas. Datum ex Palatio nostro Apostolico in monte Quirinali die 12. Julii 1724.

Benedictus Papa XIII.

VII.

Decretum S. Congregationis Episcoporum et Regularium pro Causis Criminalibus, issued Dec. 18, 1835.

Non ita pridem a S. Congregatione negotiis et consultationibus Episcoporum et Regularium præposita nonnullæ regulæ præscriptæ fuerunt pro recta et expedita definitione causarum criminalium, quæ a Curiis Episcoporum, vel Ordinariorum ad eamdem S. Congregationem in gradu appellationis deferuntur. Quas quidem præscriptiones, quoniam impedimenta sublata sunt, quæ aliqua ex parte earum exequutioni interposita fuerant, visum est Eminentissimis Patribus in Conventu habito XV. Calend. Januar. MDCCCXXXV, uberius explicare, et cum assensu, et approbatione S. D. N. Gregorii XVI. iterum promulgare, ut ab omnibus, ad quos pertinent, accuratissime serventur. Sunt autem quæ sequuntur.

I. Reis a Curiis Episcopalibus criminali judicio damnatis spatium dierum decem conceditur, quo ad S. Congregationem Episcoporum et Regularium appellare possint.

II. Decem dies numerari incipient non a die, quo sententia lata est, sed a die, quo reo vel ejus defensori per Cursorem denuntiata fuit.

III. Eo tempore elapso, quin reus, vel ejus defensor appellaverit, latam a se sententiam Episcopus exequetur.

IV. Interposita intra decem dies appellatione Curia Episcopalis acta autographa totius Causæ ad S. Congregationem continuo transmittat, nempe:

1. Processum ipsum in Curia confectum.

2. Ejus restrictum, seu compendiarum expositionem eorum, quæ ex eodum processu emergunt.

3. Defensiones pro reo exhibitas.

4. Denique sententiam latam.

V. Ipsa Curia reo, ejusque defensori denuntiabit, appellationem coram eadem S. Congregatione prosequendam esse.

VI. Si nemo compareat aut si appellationis acta negligenter vel malitiose protrahantur, congruens tempus a S. Congregatione præfinietur, quo inutiliter elapso, causa deserta censeatur, et sententia Curiæ Episcopalis executioni mandetur.

VII. Reo aut illi, qui ejus defensionem suscepit tradendus est restrictus processus, qui a Judice relatore conficitur.

VIII. Allegationes, seu defensiones Eminentissimis Patribus distribuendas typis non committantur, nisi Judex relator imprimendi veniam dederit.

IX. Causa definietur statuta die ab Eminentissimis Patribus in pleno Auditorio congregatis.

X. Eidem Congregationi Procurator Generalis Fisci, et Judex relator intererunt.

XI. Judex relator de toto statu causæ ad Eminentissimos Patres referet, et Procurator Generalis Fisci stabit pro Curia Episcopali, suasque conclusiones explanabit.

XII. Post hæc Eminentissimi Patres judicium proferunt, sententiam Curiæ Episcopalis aut confirmando, aut infirmando, aut etiam reformando.

XIII. Prolata sententia una cum omnibus Actis causæ ad eamdem Curiam Episcopalem remittitur, ut eam exequatur.

XIV. Revisio, seu recognitio rei judicatæ non conceditur, nisi ejus tribuendæ potestas a Sanctitate Sua facta fuerit, et subsint gravissimæ causæ, super quibus cognitio et judicium ad plenam Congregationem pertinet.

XV. Sciant denique Curiæ Episcopales per novissimas leges, quæ ad investiganda, et coercenda crimina pro Tribunalibus laicis promulgatæ sunt, nihil detractum esse de formis et regulis Canonicis, quas proinde sequi omnino debent non modo in conficiendo processu, ad quem spectant hæc verba Edicti diei 5 Novembris 1831.= Nihil innovetur, quantum ad judicia ecclesiastica pertinet=verum etiam in pœnis decernendis, quemadmodum in appendice ejusdem Edicti ita cautum est=Tribunalia jurisdictionis mixtæ Clericos et Personas Ecclesiasticas iis pœnis mulctabunt, quas secundum Canones, et Constitutiones Apostolicas Tribunal Ecclesiasticum iisdem irrogaret.=

J A. Card. Sala Præfectus.

J. Patriarcha Constantinopolitanus Secretarius.

VIII.

Circular of the S. C. EE. et RR., dated Aug. 1, 1851, *addressed to Bishops, concerning criminal causes of Episcopal Curiæ.*

(ENGLISH TRANSLATION)

MOST REV. SIR AND BROTHER:—His Holiness, Pope Pius VII., ordained in his Constitution *Post diuturnas* of Oct. 30, 1800, under the title *De Jurisdictionibus tribunalium et Judicum criminalium, Judiciorum forma et ordine*, in § 24, the following: "In future, the abbreviated forms which are already in use in the government of the city of Rome, will be employed in all the ecclesiastical courts of the city of Rome and of the rest of the pontifical territory."

These formulas, particularly those of the legalization of the process (*processus legitimatio*) are absolutely necessary in processes or trials which take place in Episcopal courts, according to the old mode of proceeding, and according to the

Decree of the Sacred Congregation of Bishops and Regulars dated Dec. 18, 1835.[1] Yet they are not known to some episcopal chancellors, as this Sacred Congregation has found out from a number of criminal causes adjudicated by Episcopal courts in the first instance . . . . . For this reason, it has been deemed opportune to have these formulas printed anew and sent to the various Ordinaries, so that each Episcopal chancery may possess a copy. I have the honor to enclose you a copy.[2]

At the same time I forward you a copy of the Decree of Dec. 18, 1835, in order that it may be posted in the Episcopal chancery, and carefully observed.[3] . . . . . .

Furthermore, in order that the instigators and adherents of the Fisc (namely the accusers, the complainants, denouncers, etc., who are on the side of the official *procurator fiscalis*), in case they feel themselves aggrieved by the sentence of the first instance, and in consequence appeal to this Sacred Congregation, may know their obligations, I enclose you herewith a copy of the resolution taken in a full meeting of the Sacred Congregation, held Feb. 22, 1839.[4]

Again, in order to expedite the hearing of causes appealed to this Sacred Congregation from Episcopal courts, you will kindly inform the members of your *Curia*, that when the accused, who has been condemned, appeals within ten days after receiving official notice of his sentence, to this Sacred Congregation, and his appeal is admitted by the Congregation, and this admission has been made known to the Bishop, with the direction to cause the ulterior steps to be taken within the peremptory term of twenty days, the members of the *Curia* are then bound to formally notify the appellant that if he wishes to prosecute his appeal before the Sacred Congregation, he must within the peremptory term of twenty days, appoint in this city of Rome, an advocate or procurator, approved in the Roman *Curia*, and also make sure that this advocate will undertake the case, and will, upon having deposited with the *judex relator*, the customary sum of money to pay the costs, in case of defeat, ask for the Acts of the cause at the rooms of the *judex relator;* that if the appellant fails to do this within the twenty days, he will be looked upon as having renounced his appeal, and the Sacred Congregation will issue a formal declaration to that effect.

Where, on the other hand, the parties representing, urging or adhering to the *procurator fiscalis* appeal, and that appeal is admitted by the Sacred Congregation, and this admission made known to the Bishop; the appellee must also become a party to the appeal, and consequently, he must be informed of the above interposition and admission of the appeal, and be enjoined by the Bishop's court to appoint within the peremptory term of twenty days, an advocate or procurator from among those approved in the Roman *Curia*, and if he fails to do so, it will be assumed that he does not desire to take part in the appeal; and consequently, the proceedings in the appeal will at the instance of the adherents of the fisc, be continued to the final sentence inclusive, without any further interpellation of the appellee. The same notification must also be sent to the adherents or instigators of the diocesan prosecutor.

[1] See Appendix VII.
[2] See this copy below in Appendix IX.
[3] See Appendix VII.
[4] See Appendix X.

These notifications, together with the report of the messenger delivering them, must be sent to this Sacred Congregation.

Finally, you are reminded that the acts or minutes concerning the serving of the sentence upon the accused and the latter's appeal, together with the report of the messenger must be inserted in the *Acta* of the trial or proceedings ; that these acts should be provided with a chronological index, and should, in accordance with the Decree of Dec. 18, 1835, art. iv., be sent without delay to this Sacred Congregation, together with the synopsis of the auditor, the defence and an accurate copy of the sentence, the original of which remains in the Episcopal Curia.

Have the goodness, Most Rev. Sir, to acknowledge the receipt of this circular.

Fr. A. F. Card. Orioli, Prefect.

D. Patriarch of Constantinople, Secretary.

Rome, Aug. 1, 1851.

IX.

Formulas of trials in criminal and disciplinary causes, as prescribed by Pope Pius VII, and made obligatory in the circular of the S. C. EE. et RR. Aug. 1, 1851.

(English Translation).

In order to expedite the hearing of the causes of accused persons, it is deemed necessary to shorten some of the formulas which have been hitherto used in the *compilatio processus.*

First, the entire acts of the trial or proceedings, such as those relating to the "Corpus delicti," the admonitions, the "litis contestatio" etc., of whatsoever kind or nature they may be, are to be given, in future, in the *vernacular language.* This will save the repetitions which formerly had to be laid in the mouth of the accused on occasion of admonitions, of the "litis contestatio" and other acts of a similar character. For, as these acts or formulas were made in Latin, it became necessary, for the purpose of proving that they were understood by the accused, who for the most part was ignorant of Latin, that the accused should each time repeat in the vernacular, the Latin words, or formula laid in his mouth by the auditor or judge. As, in future, the vernacular language will be used in all these proceedings, whether they regard the accused or the witnesses, it will be sufficient for the notary, to write down merely the answers, just as they are given.

Second, the acts (*acta*) in regard to the "Corpus delicti," the opinion of experts of all kinds, the finding of tools, of clothes, and other things or *indicia*, are all to be simply drawn up and signed by the notary, so that it will not be necessary to examine the witnesses intervening or also the experts individually.

Third, in order that the legalization of the process (*legitimatio processus*), especially the legalization *per confrontationem* may be less complicated and less tedious, it will be advisable that, in case the accused refuses to legitimate the process *per declarationem*, no *personal*, but only a *verbal* confrontation of the witnesses take

place; that is, that instead of the witnesses being personally placed in the presence of the accused, only their deposition be read to him by the judge (auditor) and notary, and he be allowed to make, and have put on record, whatever exceptions he desires to make against the *persons* and the *depositions* of the witnesses.[1] For this purpose, there is added at the end of this enactment, the respective formula of the legalization of the process, which contains the substantial parts of the act. The judge should endeavor to cause the legalization to be made in as brief and simple a manner as possible.

With this act (*the legitimatio*), the process becomes legitimized in all things whatsoever, whether they are already begun, or are yet to be begun, even though the written defences have been already handed in, and that with all the legal effects of a true and real legitimation.

Although for trials or processes, where there is question not merely of the accusation of a capital offence, but where, also, considering the nature of the proofs extant, sentence inflicting capital punishment may be pronounced and executed,[2] a new regulation may be issued, should it be found opportune; yet it may be left to the honest, impartial and truthful judgment of the advocates of the parties, in this case, to demand the legalization in the proper sense of the term. In case they demand this *legitimatio*, it will be discretionary with the court to grant it either by way of *personal confrontation* of the witnesses, or by way of their *formal repetition*. The formula of the personal confrontation, used at present, is also to be made shorter, and for this purpose there is added at the end of this enactment, an abreviated formula of personal confrontation.

The above practical rules and formulas shall be introduced into all the tribunals of the city of Rome and of the Pontifical Territory, those places not excepted, which have hitherto not possessed the privilege of granting the personal confrontation, in the legalization of the process.

Whenever a doubt arises as to the application of these rules and formulas, it will be the right and duty of the *procurator fiscalis* to give the required explanations.

A. Formula of legalization by way of verbal confrontation.

Date. . . . . .

The accused, N. N., having appeared before the auditor (judge) and me, the notary . . . was again admonished to tell the truth respecting himself, and was sworn on the

[1] Therefore according to this enactment, the *processus informativus* becomes legalized by this simple reading of the testimony to the accused; and the formal repetition of the witnesses need not take place, even where the accused refuses to legalize the proceedings *per declarationem*.

[2] This has reference to the ecclesiastical courts of Rome and of the Pontifical territory, where these courts, owing to the privilege of immunity, formerly took cognizance of capital offences of ecclesiastics. At present, however, the privilege of immunity is scarcely anywhere recognized by the civil government. Hence, capital offences are adjudicated solely by the secular courts. Dismissal from office or parish inflicted by the ecclesiastical court, is compared by canonists to a capital punishment of the secular court.

holy Gospels to tell the truth in regard to other parties. Thereupon, for the purpose of legalizing the process, the testimony of the witnesses N N.. examined under date of———was read to the accused, in full, and word for word. Being then asked whether he had anything to say against the *persons* or *depositions* of the witnesses, and being informed at the same time, that by this act, he was deprived of all right to have the witnesses repeat their testimony,[1] answered: After you the (auditor or judge), have caused the notary here present to read for me the deposition of the witnesses N. N., examined under date of———, and having fully understood it, I have to say etc. (Here follow his answers, which must be accurately taken down by the notary.)

Afterwards etc., etc.

B. Formula of legalization by way of Personal confrontation.

Date. . . . .

The accused N. N. having appeared before the auditor and me the notary . . . was again admonished . . . (as in the preceding formula). Thereupon, the witness N. N. was called in, and again took the oath to tell the truth. Then, for the purpose of legalizing the process, the previous deposition made by the witness, under date of———was read to him in full, and word for word. Being asked whether he now confirmed his previous statements, or whether he wished to change them in any point, he answered: (Here follow his answers, which must be carefully and accurately written down by the notary).

After this the accused was asked whether he had anything to say against the *person* or *testimony* of the witness, and being informed at the same time . . . (as in the preceding formula), answered: After you have caused the testimony of the witness N. N. here present . . . (as in the preceding formula) I have to say: (Here follows his answer.)[2]

Afterwards, etc.

X.

Resolution of the Sacred Congregation of Bishops and Regulars, adopted in the meeting held Feb. 22, 1839.

In the *Curia* of the exempted abbey of Subiaco, there was instituted, at the instance of the surgeon Aloysius A., and his daughter A., a criminal proceeding against Aloysius M., for rape, and for being the cause of the girl's pregnancy, and

[1] Where there are several witnesses, the testimony of each must be read in full to the accused. But the above declaration need not be repeated.

[2] The witness has a right, if he wishes, to reply to the accused. The accused may in turn answer the witness, and so on. The accused has the right to make the *last* answers.

for attempted abortion. After the proceedings had been closed and the allegations of both parties handed in, the case was decided by the criminal court of His Emminence Cardinal and Abbot Spinola, on Jan. 3. 1839, as follows: "*Non constare de stupro, ideoque Aloysium M. . . esse dimittendum ex hactenus deductis: in reliquis provideat Eminentissimus Abbas ad mentem.*" This *mens* consisted in prudential measures for the purpose of preventing farther excitement and animosities between the contending parties, and in strictures upon the advocate C., for having used certain unbecoming expressions in his written allegations.

After receiving notice of this resolution, the accuser A., and his daughter A., gave formal notice to court of the Abbey of Subiaco, that they appealed against the above sentence.

Whereupon His Eminence, the Abbot, sent to this Sacred Congregation of Bishops and Regulars, all the acts of the process, together with the synopsis of the *procurator fiscalis*, and the allegations or deductions of both parties, as made in the *Curia* of the first instance, and at the same time, proposed the following question: Whether the appeal interposed in the case was admissible or not?

The *judex relator* then considered it his duty to inform each of the Cardinals of this Sacred Congregation of the proposed question, in order that it might be submitted to their Eminences, for their decision in the meeting of Feb. 22, 1839.

Resolution: In the meeting of the Congregation held in the Apostolic Palace of the Vatican, on the 22d, of Feb. 1839, their Eminences decided as follows: "*Affirmative ad primam partem, negative ad secundam, præstita fide jussione per institorem de reficiendis expensis tam primi quam ulterius judicii in eventu succumbentiæ et certioretur Eminentissimus abbas, etiam pro intimatione ad constituendum defensorem intra viginti dies.*"

Præsens resolutio adnotetur in libro decretorum.

A. Bizzarri, Sub-Secretarius.

XI.

DECREE OF THE ROMAN COUNCIL HELD BY BENEDICT XIII., IN 1725, CONCERNING THE OATH ADMINISTERED TO THE ACCUSED.

Tit. XIII: De jure jurando.

Cap. II. Juramentum alias exigi solitum a Reis criminaliter inquisitis, dum judicialiter uti Principales examinantur, in posterum ne ullo modo ab iis in quocunque Tribunali exigatur, præsenti, constitutione inhibetur.

Reprehensibile judicari non debet, si secundum temporum varietates, ubi id necessitas vel utilitas exposcat, consuetudines et leges quandoque varientur humanæ; ipse enim Deus et Dominus, Aeternus Legifer noster, ex iis, quæ veteri in Testamento statuerat, multa postmodum mutavit in novo. Stylum itaque in quibusdam Curiis Secularibus et Ecclesiasticis, nullo unquam jure præceptum, inolevisse perpendimus,

ut Judices sive eorum Notarii aut Scribæ, Reos criminali facinore accusatos examinaturi, juramentum ab his præstari jubeant de veritate dicenda. Quia tamen ex hoc, quotidiana sicuti est experientia compertum, nec in Fisci favorem nec contra Reos ipsos, qui ut plurimum patrata a se negant delicta, utilitatis aliquid elici non ignoratur, adeo ut peculiari in hac facti contingentia nedum talia deinceps juramenta exigendi necessitas non adesse probetur, imo potius, ne illa penitus exigantur, sacri ipsa juramenti ratio postulet ac suadeat: hinc est, quod Nos, rationibus utrinque perpensis, et quam plurium inhærentes insignium Tribunalium praxi, juramentum ipsum per Reos sic criminaliter inquisitos præstandum consulto, *dum uti Principales tantummodo constituuntur*, tollendum et submovendum ducimus; prout, sacro etiam approbante Concilio, præsenti hac constitutione omnino tollimus ac submovemus: nec juramentum hujusmodi ullatenus a Reis eisdem, *nisi tamen ut testes quoad alios examinentur*, in futurum per quoscunque Judices et Ministros sub quovis prætextu, causa et quæsito colore, volumus, exigatur; alias examen sive constitutum et Acta omnia nulla sint eo ipso et irrita omnique careant contra Reos effectu.

XII.

DECREE OF THE S. C. EE. ET RR., REGARDING APPEALS MADE TO THE HOLY SEE, IN CRIMINAL AND DISCIPLINARY CAUSES OF ECCLESIASTICS, ADJUDICATED IN THE MANNER LAID DOWN IN THE INSTR. OF JUNE 11, 1880, AND *CUM MAGNOPERE*, OF 1884.

Dispositio Provisoria

pro actis appellationis in causis criminalibus.

Sacra hæc C. Epp. et RR. pro certo habens quod modi procedendi œconomice, ordinati per Instructionem diei 11 Junii 1880 pro curiis ecclesiasticis in causis criminalibus quæ clericos respiciunt, observari quoque debeant in actis appellationis quæ apud ipsum Sacrum Consessum interponitur a sententiis ipsarum curiarum, opportunam censuit publicationem sequentis dispositionis:[1]

I. Defensor rei vel reorum eligendus inter advocatos a sacris Congregationibus approbatos, prævio deposito de more, prudenter notitiam sumit de restricta et processu coram Judice relatore.

II. Quatenus vero ratione causæ expedire censeat Emus. Dominus Card. Præfectus injungitur defensori servare secretum cum jurisjurandi vinculo.

III. Exhibitis defensionibus in scriptis, eædem quatenus Emus. Dom. Card.

[1] *Acta S. S.*, Vol. xix., p. 296.

Præfectus æque opportunum censeat, communicari queunt procuratori fiscali curiæ *a qua*, ut ille si necesse esse crediderit, in scriptis respondeat.

IV. De responso procuratoris fiscalis defensor sub debita cautela cognitionem sumere potest coram Judice relatore, ut replicare ultimo valeat pariter in scriptis.

V. Omnino autem excluditur defensoris et procuratoris fisci præsentia in comitiis Cardinalium quando causa resolvenda proponitur.

VI. Excepta dispositione præcedentium articulorum, in sua plena vi quoad omnes partes ea omnia permanent quæ S. C. constituit per decretum diei 18 Decembris 1835, per literas circulares diei 1 Augusti 1851, et per ordinationem diei 6 Junii 1847.[1]

Ex. aud. SSmi diei 26 *Martii* 1886.

SSmus. Dnus. Noster Leo div. prov. PP. XIII. audita relatione præsentis dispositionis ab infrascripto S. C. Epp. et RR. Secretario, eam in omnibus approbare et confirmare dignatus est.

Romæ die et anno quibus supra.

J. Card. Ferrieri, *Præf.*
Fr. Ant. M. Archp. Palmyren., *Secret.*

XIII.

Instructio S. Congregationis de Prop. Fide supra Suspensionibus ex Informata Conscientia.

Omni tempore sollicita fuit Ecclesia ut non solum ascensus ad sacros Ordines interdiceretur indignis, verum etiam ab eorumdem exercitio criminosi suspensi manerent.

Cum autem occultorum quoque criminum, quæque prodere non expediret, facilis et prompta, nempe a judiciariis formis libera, coercitio aliquando necessaria sit ad sacri ministerii dignitatem, et fidelium utilitatem tuendam; hinc sapientissimo consilio Tridentini Patres Sess. xxiv. cap. 1. de Reform. decreverunt: "*Ei cui ascensus ad sacros ordines a suo Prælato ex quacumque causa, etiam ob occultam crimen, quomodolibet, etiam extrajudicialiter fuerit interdictus, aut qui a suis ordinibus seu gradibus vel dignitatibus ecclesiasticis fuerit suspensus, nulla contra ipsius Prælati voluntatem concessa licentia de se promoveri faciendo, aut ad priores ordines, gradus et dignitates sive honores restitutio suffragetur.*"

Ex hoc provido decreto, in eo quod refertur ad Clericorum crimina, quæ extrajudicialem suspensionem ab ecclesiasticis officiis merentur, iamdudum in usu fuit suspensionis pœna ex causis Prælato notis; quæ nempe audit suspensio *ex informata conscientia.* Ad hoc itaque ut in eadem infligenda, cum majori qua potest cautela et securitate Ordinarii catholicarum missionum procedant, S. Congregatio de

[1] *Acta S. S.*, Vol. xix., p. 298.

Propaganda Fide præsentem instructionem edendam censuit, cui iidem Ordinarii in adhibendo hoc extraordinario remedio sese conformare curabunt.

I. Suspensio ex informata conscientia, non secus ac illa, quæ per judicialem sententiam infligitur, personam ecclesiasticam a suis ordinibus, seu gradibus, vel dignitatibus ecclesiasticis exercendis interdicit.

II. In hoc præcipue ipsa differt a judiciali suspensione, quod adhibetur tamquam extraordinarium remedium in pœnam admissi criminis; ideoque ad ejusdem impositionem non requiruntur nec formæ judiciales, nec canonicæ admonitiones. Satis erit proinde, si Prælatus hanc pœnam infligens, simplici utatur præcepto, quo declaret se suspensionem ab exercitio sacrorum officiorum vel ecclesiasticorum munium indicere.

III. Hujusmodi præceptum semper in scriptis intimandum est, die et mense designato; ideoque autem fieri debet vel ab ipso Ordinario, vel ab alio expresso ipsius mandato. In eadem tamen intimatione exprimendum est, quod ejusmodi punitio irrogatur in vim Tridentini decreti, Sess. xiv., c. 1 de reform., ex informata conscientia vel ex causis ipsi Ordinario notis.

IV. Debent insuper exprimi partes exercitii ordinis vel officii, ad quas extenditur suspensio; quod si suspensus interdictus sit ab officio, cui alter in locum ipsius substituendus est, ut puta Œconomus in cura animarum, tunc substitutus mercedem percipiet ex fructibus beneficii in ea portione, quæ juxta prudens Ordinarii arbitrium taxabitur. At si suspensus in hac taxatione se gravatum senserit, moderationem provocare poterit apud curiam Archiepiscopalem, aut etiam apud Sedem Apostolicam.

V. Exprimi item debet tempus durationis ejusdem pœnæ. Abstineant tamen Ordinarii ab ipsa infligenda in perpetuum. Quod si ob graviores causas Ordinarius censuerit eam imponere non ad tempus determinatum, sed ad suum beneplacitum, tunc ipsa habetur pro temporanea, ideoque cessabit cum jurisdictione Ordinarii suspensionem infligentis.

VI. Suspensioni ex informata conscientia justam ac legitimam causam præbet crimen, seu culpa a suspenso commissa. Hæc autem debet esse occulta, et ita gravis, ut talem promereatur punitionem,

VII. Ad hoc autem ut sit occulta requiritur, ut neque in judicium, neque in rumores vulgi deducta sit, neque insuper ejusmodi numero et qualitati personarum cognita sit, unde delictam censeri debeat notorium.

VIII. Verum tenet etiam suspensio si ex pluribus delictis aliquod fuerit notum in vulgus; aut si crimen, quod ante suspensionem fuerat occultum, deinceps post ipsam fuerit ab aliis evulgatum.

IX. Prudenti arbitrio Prælatorum relinquitur suspensionis causam, seu ipsam culpam delinquenti aut patefacere, aut reticere. Partes alioquin pastoralis sollicitudinis et charitatis eorumdem erunt, ut si istiusmodi pœnam suspenso manifestare censuerint, ipsa ex paternis, quas interponent, monitionibus, nedum ad expiationem culpæ, verum etiam ad emendationem delinquentis, et ad occasionem peccandi eliminandam inserviat.

x. Meminerint vero Præsules, quod si contra decretum, quo irrogata fuit suspensio, promoveatur recursus ad Apostolicam Sedem, tunc apud ipsam comprobari debet culpa, quæ eidem præbuit occasionem. Consultum idcirco erit, ut antequam hæc pœna infligatur, probationes illius, quantumvis extrajudicialiter et secreto colligantur; ita ut eo ipso, quod cum omni certitudine culpabilitatis in punitione inferenda proceditur, si deinceps causa examinanda est apud Apostolicam Sedem, probationes criminis in eas difficultates haud impingant, quæ ut plurimum occurrunt in istiusmodi judiciis.

xi. A decreto suspensionis ex informata conscientia non datur appellatio ad tribunal superioris ordinis. Postquam idcirco clericus intimationem suspensionis habuerit, si nihilominus appellationem interponere, ejusque obtentu in altare ministrare, seu quovis modo suum ordinem solemniter exercere præsumat, statim incidit in irregularitatem.

xii. Semper tamen patet aditus ad Apostolicam Sedem; et in casu quo clericus absque sufficienti ac rationabili causa se hac pœna multatum reputet, recurrere poterit ad Summum Pontificem. Interim tamen in vigore permanet decretum suspensionis usque dum ab ipso Pontifice, vel a S. Congregatione, quæ de recursu judicare debet, non fuerit rescissum aut etiam moderatum.

xiii. Ceterum ex quo istiusmodi pœna est remedium omnino extraordinarium, quod præsertim ad expiationem criminum absque formis judiciariis adhibetur, præ oculis habeant Prælati id quod sapientissime admonet Summus Pontifex s. m. Benedictus XIV. in suo tractatu *de Synodo Diœces.* l. xii., c. 8, n. 6, quod nimirum reprehensibilis foret Episcopus, si in sua synodo declararet, si deinceps ex privata tantum scientia cum pœna suspensionis a divinis animadversurum in clericos, quos graviter deliquisse compererit, quamvis eorum delictum non possit in foro externo concludenter probari, aut illud non expediat in aliorum notitiam deducere.

Romæ ex Ædibus S. Congregationis de Prop. Fide die 20 Octobris 1884.

XIV.

Recent Decision of the S. C. de Prop. Fide concerning the Dismissal and Transfer of our Rectors who are not Irremovable.

S. CONGREGATIONE DI PROPAGANDA, SEGRETARIA.

N. 2311. Roma, li 20 Maggio, 1887.

Oggetto.

Sul modo di procedere nel cambiare i Rettori amovibili.

Eme ac Rme Dne Dne Obne.

In Concilio Plenario Baltimorensi III., Tit. X., Cap. 3, § 1, 2. nec non in Instructione hujus S. Congregationis, quæ incipit "Cum Magnopere" circa causas Cleri-

corum, normæ ac regulæ præscribuntur circa modum, quo procedi debet in causis Clericorum. Porro non adhuc apprime determinatum ac statutum erat quibus in casibus Episcopi ad legalis processus confectionem tenerentur, cum de Rectoribus Missionum aut ab officio privandis, aut ad aliud officium transferendis ageretur, ubi de amovilibus sermo sit.

Jamvero Emi Patres S. Consilio Christiano nomini propagando præpositi in Comitiis Generalibus die 28 Martii 1887 habitis sequentia decreverunt: "In casibus remotionis peragendæ, seu privationis totalis ab officio Rectoris, in pœnam criminis vel reatus disciplinaris canonicus processus juxta præfatæ Instructionis—'Cum Magnopere'—et Concilii III. Plenarii decreta, confici debet. Cum vero agatur de translatione Rectoris ab una Missione ad aliam aut ad aliud officium etiam inferius, Ordinarii non tenentur ad canonici processus instructionem; opus est autem ut hoc fiat graves ob causas, et habita meritorum ratione juxta dispositionem Concilii Plenarii Baltimorensis III., Tit. II., Cap. V., § 32. Si in casu translationis fiat recursus ad S. Congregationem, S. Congregatio remittet recursum ad Metropolitam, vel si agatur de Metropolita, ad Metropolitam viciniorem."

Rogo autem E. T. ut hanc Sacræ Congregationis resolutionem omnibus Archiepiscopis Statuum Fœderatorum communicare velit.

Interim manus tuas humillime deosculor.

Eminentiæ Tuæ

Humillimus Addictissimus Servus verus,

JOANNES CARD. SIMEONI, *Præfectus*

D. ARCHIEP. TYREN., *Secr*

Emo ac Rmo. Dno CARD. JACOBO GIBBONS, *Archiepiscopo Baltimorensi.*

XV.

Legalization of the Proceedings.—
(*Supra, n.* 236, 252, 334, 354, 355, 361.)

Canonists unanimously teach that the *legitimatio processus* is made either *per declarationem rei*, or *per testium repetitionem.* They hold that, when the accused declines to legalize the informative process by his declaration, it will be necessary to examine the witnesses over again, and that either in the presence or absence of the accused. If this repetition takes place in his presence, it is called *confrontatio personalis;* if in his absence, *confrontatio verbalis.*

The Circular of the S. C. EE. et RR., dated August 1, 1851, appears to leave it *optional* with the judge either to grant or refuse to allow this repetition of the witnesses, even where the accused declines to *declare* the informative proceedings legitimate. According to this circular, all that seems necessary, in case the accused refuses to make this declaration, is to read to him the depositions of the witnesses

given in the informative proceedings, and allow him to hand in his cross-questions and objections.

Here it should be noted that this mode of legalizing the informative process was originally laid down only for the city of Rome and the Pontifical Territory; that the Circular of the S. C. EE. et RR. of August 1, 1850, which, among other regulations, prescribes the above form of legalization, was not made obligatory, outside of the Pontifical Territory, either by the Instruction of June 11, 1880, or by the Instruction *Cum Magnopere* of 1884, except in so far as it relates to *appeals*, and therefore not in so far as it relates to the legalization of the process.[1]

Hence it is that even those canonists who wrote after the date of the circular of August 1, 1851, teach that, when the accused declines to *declare* the proceedings legitimate, the formal repetition of the witnesses must take place. For it cannot be supposed that they were all ignorant of this circular. They evidently considered it as obligatory only in Rome and the Pontifical Territory. They do not agree with a recent writer, who asserts the contrary, and that without any proof.

While, therefore, the form of legalization prescribed in the above circular does not appear to be obligatory with us, at least until the Holy See so declares, it may nevertheless be safely adopted.

[1] Instr. June 11, 1880, art. xxxii.; Instr. *Cum Magnopere*, art. xxxvi.

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